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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SHARON TYUS; FREEMAN BOSLEY, SR.; BERTHA MITCHELL; IRVING CLAY, JR.; and CLAUDE TAYLOR,

Petitioners,

v.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and CITY OF ST. LOUIS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. To avoid providing blacks with an equal number of seats on the St. Louis Board of Aldermen, can the existing Board of Aldermen members *intentionally* discriminate against black residents and voters by manipulating ward boundaries *for the purpose* of maximizing white voting power, without violating the Voting Rights Act, as long as the "bottom line" is that the redistricting plan creates a number of black-majority wards proportional to the percentage of black voters?

2. Should this Court resolve a conflict among the Courts of Appeals as to whether voting-age population or total population provides the legally-relevant baseline in determining whether a minority group protected under the Voting Rights Act receives proportionality in a redistricting plan?

3. Does proportionality bar a results claim under §2 of the Voting Rights Act even when dramatically different boundary-drawing practices were used in the black community than were used in the white community which resulted in minimizing black voting strength while maximizing white voting strength?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the United States Court of Appeals for the Eighth Circuit were petitioners Sharon Tyus; Freeman Bosley, Sr.; Bertha Mitchell; Irving Clay, Jr.; and Claude Taylor; and respondents Freeman Bosley, Jr., in his capacity as Mayor, City of St. Louis, Missouri; Thomas Villa, in his capacity as President, Board of Aldermen; City of St. Louis, Missouri; Board of Alderman, City of St. Louis, Missouri; and City of St. Louis.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS BELOW ..	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Statement of the Facts	2
B. The Proceedings Below	4
C. The Courts' Opinions	9
1. The district court	9
2. Plaintiffs' first round in the Eighth Circuit	9
3. Proceedings in the United States Supreme Court	10
4. Proceedings in the Eighth Circuit on remand	10
REASONS FOR GRANTING THE WRIT	12
ARGUMENT	13
I. THE LOWER COURT'S DECISION THAT PROPORTIONALITY DEFEATS AN INTENTIONAL RACIAL GERRYMANDERING CHALLENGE TO	

A SINGLE-MEMBER DISTRICT PLAN CONFLICTS WITH THIS COURT'S DECISIONS IN *DEGRANDY*, *SHAW*, AND *MILLER* AND PRESENTS AN ISSUE OF PUBLIC IMPORTANCE THAT REQUIRES CLARIFICATION BY THIS COURT 14

II.

IF PROPORTIONALITY IS A DEFENSE TO VOTING RIGHTS CLAIMS, THE LOWER COURTS' USE OF VOTING-AGE POPULATION RATHER THAN TOTAL POPULATION AS THE MEASURE OF PROPORTIONALITY RAISES AN IMPORTANT ISSUE ON WHICH LOWER COURTS HAVE TAKEN DIVERGENT POSITIONS 19

A. This Court should resolve the conflict in the lower courts regarding the proper measure of proportionality and should make clear that total population is the legally-relevant baseline 19

B. The purpose for weighing "proportionality," as well as this Court's precedents and the language of the Act, all point to total population as the proper measure of proportionality 20

III.

PROPORTIONALITY DOES NOT DEFEAT PLAINTIFFS' §2 RESULTS CLAIM WHEN DIFFERENT BOUNDARY-DRAWING PRACTICES WERE USED IN THE BLACK COMMUNITY THAN WERE USED IN THE WHITE COMMUNITY WHICH RESULTED IN MINIMIZING BLACK VOTING STRENGTH WHILE MAXIMIZING WHITE VOTING STRENGTH 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases	PAGE
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)	28
Assembly of State of Cal. v. U.S. Dept. of Commerce, 968 F.2d 916 (9th Cir. 1992)	26
Baird v. Consolidated City of Indianapolis, 976 F.2d 357 (7th Cir. 1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 2334, 124 L.Ed.2d 246 (1993)	15
Barnett v. Daley, 32 F.3d 1196 (7th Cir. 1994)	12, 15, 19, 20, 22, 23, 24
Barnett v. Daley, 809 F.Supp. 1323 (N.D.Ill. 1992), *rev'd*, 32 F.3d 1196 (7th Cir. 1994)	20
Bonilla v. Nazario, 843 F.2d 34 (1st Cir. 1988)	29
Buckingham v. United States, 998 F.2d 735 (9th Cir. 1993)	29
Campbell v. Theodore, ____ U.S. ____, 113 S.Ct. 2954, 125 L.Ed.2d 656 (1993)	20
Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)	29
City of Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1519, 64 L.Ed.2d 47 (1980)	14, 25
City of New York v. U.S. Dept. of Commerce, 822 F.Supp. 906 (E.D.N.Y. 1993), *cert. granted*, ____ U.S. ____, 116 S.Ct. 38, 132 L.Ed.2d 919 (1995)	26
City of Richmond, Virginia v. United States, 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975)	12, 15, 19

Cousin v. McWherter, 46 F.3d 568 (6th Cir. 1995) 12, 14, 19

DeWitt v. Wilson, 856 F.Supp. 1409 (E.D.Cal. 1994), *aff'd in part and appeal dismissed in part*, ____ U.S. ____, 115 S.Ct. 2637, 132 L.Ed. 2d 876 (1995) 24

Fountain v. Filson, 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971 (1949) 29

Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991) 12, 15, 19, 24

Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) 17

Growe v. Emison, 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) 20, 26

Hartman v. Board of Trustees of Community College Dist. No. 508, Cook County, Ill., 4 F.3d 465 (7th Cir. 1993) 29

Jeffers v. Clinton, 730 F.Supp. 196 (E.D.Ark. 1989), *aff'd*, 498 U.S. 1019, 111 S.Ct. 662, 112 L.Ed.2d 656 (1991) 19

John Deere Co. v. American Nat. Bank, Stafford, 809 F.2d 1190 (5th Cir. 1987) 29

Johnson v. DeGrandy, ____ U.S. ____, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) . . . . . *passim*

Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985) 17

Kirkpatrick v. Preisler, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969) 21

Mariash v. Morrill, 496 F.2d 1138 (2d Cir. 1974) . . 29

Miller v. Johnson, ___ U.S. ___, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) 12, 16, 19

Miller v. Villa, No. 93-1811 (8th Cir.) 8

Nash v. Blunt, 797 F.Supp. 1488 (W.D.Mo. 1992), *aff'd*, ___ U.S. ___, 113 S.Ct. 1809, 123 L.Ed. 2d 441 (1993) 19

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1795, 131 L.Ed.2d 723 (1995) 12, 14, 19

Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) 21

Rodgers v. Lodge, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) 18

Rural West Tennessee African-American Affairs Council, Inc. v. McWherter, 836 F.Supp. 453 (W.D.Tenn. 1993), *vacated*, ___ U.S. ___, 114 S.Ct. 2647 (1994), *on remand*, 877 F.Supp. 1096 (D.Tenn.), *aff'd*, ___ U.S. ___, 116 S.Ct. 42 (1995) 19

Shaw v. Reno, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) 12, 16, 18, 19

Tavery v. United States, 32 F.3d 1423 (10th Cir. 1994) 29

Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) ..... *passim*

United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) 24

Voinovich v. Quilter, 507 U.S. 146, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) 17, 26

Voinovich v. Quilter, ___ U.S. ___, 116 S.Ct. 42 (1995) 29

Statutes

United States Constitution, 14th and 15th Amendments 4, 14, 16

28 U.S.C. §1254(1) 1

42 U.S.C. §1973 ..... *passim*

Other Authorities

S.Rep. No. 417, 97th Cong., 2d Sess. 19 25

IN THE

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Petitioners,

v.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and CITY OF ST. LOUIS,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Sharon Tyus; Freeman Bosley, Sr.; Bertha Mitchell; Irving Clay, Jr.; and Claude Taylor respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 54 F.3d 1345 and appears in Appendix A to this petition. The Eighth Circuit's order denying petitioners' petition for reconsideration and suggestion for rehearing *en banc*, with three judges dissenting, appears in Appendix B. The order of this Court granting petitioners' petition for a writ of certiorari, vacating the prior Eighth Circuit's judgment and remanding the case for consideration in light of *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994), is reported at 114 S.Ct. 2776 and appears in Appendix C. The prior opinion of the Eighth Circuit, together with the order denying petitioners' suggestion for rehearing *en banc* and the written dissent to that order by Judge McMillian, are reported at 999 F.2d 1301 and appear at Appendix D. The opinions of the district court granting defendants' motion for summary judgment and denying plaintiffs' Rule 59(e) motion to alter or amend are unpublished and appear as Appendices E and F, respectively.

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit was entered on May 12, 1995. On August 9, 1995, the Court of Appeals, with three judges dissenting, denied petitioners' suggestion for rehearing *en banc*. On October 26, 1995, this Court extended the filing date to November 28, 1995. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves §2 of the Voting Rights Act, as amended, 42 U.S.C. §1973. The relevant portion of the statute appears at Appendix G.

STATEMENT OF THE CASE

A. Statement of the Facts.

In 1991, defendant St. Louis Board of Aldermen was required to redraw its 28 aldermanic ward boundaries in accordance with the 1990 census. St. Louis is fast becoming a majority-black city. During the decade of the 1980s, black population grew by 28,000 and white population declined by 40,000, with the result that, according to the 1990 census, St. Louis' overall population was 50.2% white, 47.4% black, and 2.5% Hispanic and other minorities.[1] Its voting-age population was 55% white, 42.6% black, and 2.4% Hispanic and others (159-210). The city is strikingly segregated; over 90% of the white population live on the city's south side and north along the Mississippi River to the northernmost corner, while over 90% of the black population live on the north side and west of the riverfront (App. A-6). As a result of the population changes, at the time the 1990 redistricting began, using 1990 census and the 1980 ward boundaries, there were 13 wards with black population majorities at or

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[1] According to the Census Bureau's adjusted post-enumeration figures, St. Louis was 48.9% white, 48.5% black, and 2.5% Hispanic and other minorities (168). Note that the population figures used in the lower court opinion (App. A-5) combine Hispanic population with white population. Citations are to the pages of the record appendix filed with the Eighth Circuit ("___"), or to the record below ("R __"), or to the appendix to this petition ("App. __").

above 60%; 13 wards with white population majorities at or above 58%; and one plurality white and one plurality black ward (45-83). It was possible to draw as many as 17 "safe black" wards and as few as 11 "safe white" wards (App. A-6).[2] Thus, "maximizing" black representation would have meant creating 17 black wards.

No one proposed a redistricting plan that would have created 17 black wards. Instead, during the redistricting process, a black alderman offered a plan that provided for 14 "safe" black and 14 "safe" white wards (App. A, 5; 89). The Board of Aldermen, comprised of the then-sitting 17 white aldermen and 11 black aldermen, then adopted a plan that provided for 16 "safe" white wards in which whites have a voting-age majority (and have since elected white aldermen), 11 "safe" black wards in which blacks have a voting-age majority (and have since elected black aldermen), and one ward (the 2nd) in which blacks have a 59.4% voting-age majority but which has since elected a white alderman.

Thus, in a city almost evenly divided in population between whites and blacks, and in which black population was increasing and white population decreasing, the 17 white aldermen drew a ward map designed to preserve white political control as well as their own incumbencies throughout the decade of the 1990s. As of 1995, they have succeeded in maintaining their own seats and the overwhelming white domination of this racially-mixed but polarized city council. Plaintiffs allege that the Board of Alder-

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[2] The panel used the term a "safe ward" to mean a ward in which the racial majority has a "practical opportunity to elect the candidate of its choice" (App. A-5, n. 4). The panel also found that "in light of the uncontested presence of the *Gingles* factors . . . each safe black ward will elect a black alderman as its candidate of choice" (App. A-4, n. 3).

men accomplished this end by employing traditional racial gerrymandering techniques (84-90).

B. The Proceedings Below.

In January, 1992, plaintiffs challenged the 1991 ward map[3] on the ground that its ward boundaries were intentionally manipulated to avoid the creation of new black wards by using dramatically different districting techniques for white and black population areas. The purpose and the effect of this intentional manipulation was to minimize black voting strength and maximize white voting strength in violation of §2 of the Voting Rights Act and the 14th and 15th Amendments of the Constitution (1-18). The complaint alleged that if the same boundary-drawing practices had been employed in the white parts of town that were used in the black parts of town, blacks would constitute an effective voting majority in at least 14, or two additional wards (10). The complaint also alleged the additional *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), prerequisites of black cohesiveness and white bloc voting, and that the black community continues to bear the burdens of a history of discrimination. Finally, plaintiffs alleged that defendants drew the map with "[t]he purpose to deny or abridge the [voting] rights of the blacks on account of race" (10).

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[3] In their complaint, plaintiffs also alleged a one-person, one-vote claim under the 14th Amendment, together with a vote dilution or racial gerrymander claim under §2 of the Voting Rights Act and the 14th and 15th Amendments. The trial court rejected plaintiffs' one-person, one-vote claim and treated plaintiffs' vote dilution and/or racial gerrymander claims under §2 and not the Constitution. On appeal, plaintiffs argued both their "results" and their "intent" claims under §2 only. They did not appeal the one-person, one-vote ruling.

Defendants admitted the *Gingles* prerequisites (App. A, 14). Before any discovery on plaintiffs voting rights claim, defendants also moved for summary judgment on the ground that the map provided blacks with the possibility of obtaining proportional representation as measured by their share of the city's voting-age population. Defendants argued that, "as a matter of law," a plan that provides proportional representation cannot violate §2 (26).[4]

On the summary judgment motion, plaintiffs' original attorneys responded without a brief but with an affidavit of their expert, Dr. Jones (84-90). *See infra* at note 7. Dr. Jones identified three techniques the defendants had used to manipulate specific ward boundaries in order to maintain white control and protect white incumbents by purposefully reducing black population and increasing white population in specific wards. Because the only facts in the record are contained in the Jones affidavit, they are set forth in detail.[5]

First, Dr. Jones concluded that defendants had maximized white voting power while minimizing black voting power by "alter[ing] ward boundaries to increase the number of white voters in wards 6, 7, and 17 . . . in order to

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[4] In support of their motion, defendants attached the affidavit of Dr. Davison who, for his §2 "proportional representation analysis" simply compared the black percentage of the city's voting-age population with the number of 60% black voting-age majority wards (32). Dr. Davison performed no analysis of the voting behavior of either the black or white population.

[5] Attached to this petition as Appendix H is a racially-coded map of the City of St. Louis with the 1991 ward boundaries. Plaintiffs offered this map as an exhibit with their *pro se* and Rule 59(e) submissions (see *infra*, at 8 n.7 and 9 n.8) and with the addendum to the brief in the Eighth Circuit. It is not, however, part of the summary judgment record as defined by the Eighth Circuit (see App. A, 10-12).

assure that black voters would not be able to elect representatives of their choice in said wards" (89).[6]

Second, according to Dr. Jones's affidavit (88):

> [defendants] fragment[ed] or split[ ] a geographically compact group of black voters among seven wards where they will constitute a voting minority in each of such wards, i.e. wards 6, 7, 8, 9, 10, 17 and 28, when they could constitute a voting age majority in two of those wards, e.g. wards 6 and 17 without such fragmentation.

The seven contiguous wards identified by Dr. Jones comprise the "central-corridor" area of the city. 100,230 persons reside in these wards, including 34,685 blacks (34.6%) who are part of a community that is both homogeneous and geographically compact enough to constitute two wards if not fractured (50, 88). The 1991 map distributes these 34,685

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[6] To see the significance of this technique, consider the following chart:

	1981 boundaries with 1990 census figures					1991 boundaries with 1990 census	
Ward	Pop.	% White	% Black	Blacks Redistricted Out	Whites Redistricted In	Pop.	% Black
6	14,100	37.1	59.6	663	1,357	14,746	52.4
7	13,298	49.9	46.6	500	1,330	14,278	39.9
17	15,680	46.1	48.8	1,980	790	14,279	39.7

Thus, under the 1981 ward map, according to the 1990 census, the 6th ward was 59.6% black and it was 67 people beneath the ideal ward population of 14,167. The ward did not have to be redrawn at all. Nevertheless, defendants altered the ward boundaries to redistrict out 663 blacks and redistrict in 1,357 whites. As a result, a 59.6% black-majority ward became a 52.4% majority (or 46% voting-age minority). Had defendants reversed the population flow, the 59.6% black majority would have been elevated to over 66% (6, 43-50, 56, 64-67). The 6th, 7th, and 17th wards are in St. Louis' central-corridor area.

blacks among the seven wards as "ineffective minorities" of 52.6% (but 45.9% of the voting-age population), 40.2%, 45.0%, 17.6%, 11.6%, 40.1%, and 34.3%, respectively (50, 88-89).

The third technique defendants used to minimize or waste black voting strength was "packing black voters into twelve wards, . . . where they constitute an overwhelming black majority in eleven of said wards in excess of 75% of the population of the wards, when black voters would have been able to elect candidates of their choice in 14 wards of less concentrated black populations . . ." (88). In other words, every black ward, including the black wards that border on the "central-corridor" area, is a packed ward, while only 11 of 17 wards that elect white aldermen are packed (56). As a result, St. Louis' 17 white aldermen are elected from wards which average 79% white population, while its 11 black aldermen are elected from wards which average 93.5% black population (50).

Dr. Jones further testified in her affidavit that boundaries were manipulated along racial lines to "maintain[] the reelection chances of white incumbents [and] prevent black voters from electing representatives of their choice" (89). An additional example of this is the city's 2nd ward, which was drawn to wind more than seven miles along the riverfront from the central corridor to the northernmost tip—picking up virtually every white voter along the way. Adjacent to the 2nd ward's seven-mile western border are five wards with black majorities of 90.1% (3rd ward), 98.0% (21st), 98.9% (20th), 98.4% (1st), and 96.4% (27th) (50).

Dr. Jones concluded that if defendants had employed the same line-drawing practices in drawing boundaries for the white-majority wards as they had used in drawing black-majority wards, and if they had treated black and white population evenhandedly, at least two additional effective

black-majority wards would have resulted (87).[7]

In reply, defendants offered no response to any of Dr. Jones's factual analysis or conclusions about intentional racial gerrymandering. Instead, they argued that evidence

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[7] Shortly after Dr. Jones's affidavit was filed, a group of the plaintiffs (the Bosley plaintiffs) filed motions with the district court advising the court that they had discharged their original attorneys because of a conflict and general dissatisfaction stemming from their lawyers' lack of experience. Because the original attorneys would not agree to the appearance of additional counsel for these plaintiffs, the Bosley plaintiffs sought leave to voluntarily withdraw and to dismiss their claims without prejudice so that they could join in a separate complaint brought by lawyers experienced in voting-rights litigation, and to consolidate the two lawsuits before the original judge (101, 122). Their original attorneys then moved to withdraw. While these motions were pending, the Bosley plaintiffs learned that their original lawyers had not only failed to file a brief in response to the defendants' motion for summary judgment but were not going to do so. Consequently, they sought to rectify counsel's lapse by seeking leave to file, *instanter* and *pro se*, a memorandum of law and two supporting affidavits in opposition to defendants' motion with exhibits including (a) the 1990 census data (which defendants had mischaracterized but not attached); (b) the 1980 and 1990 ward maps with the relevant census data; (c) two affidavits that elaborated on the claim that the boundaries were purposefully drawn along racial lines to increase the number of white voters and to decrease the number of black voters in specific wards and that the 2nd ward was not an "effective" black-majority ward (105-27). (See App. A, 10-12.) On the same day, without explanation, the trial court denied the Bosley plaintiffs' motion (128). The trial court filed its opinion three weeks later, and on that date denied plaintiffs' other motions, as well as the lawyers' motion to withdraw, as moot (141).

The district court subsequently granted summary judgment in the second lawsuit on the ground that the decision in the instant case constitutes a *res judicata* bar to any challenge to the 1991 ward map, even one brought by persons not a party to this suit. The Eighth Circuit panel refused to consolidate the two cases both before and after remand in this case, and the second litigation is currently pending before the same panel. *Miller v. Villa*, No. 93-1811.

of boundary manipulations was irrelevant because they were raising the affirmative defense of proportional representation. Relying exclusively on this "proportional representation" affirmative defense, defendants have never taken issue with Dr. Jones's conclusion that non-discriminatory redistricting would have generated *at least* two additional effective voting-age black majority wards—thus making the city council equally divided between white and black aldermen. Nor have they offered any evidence that the purposeful maximization of white-controlled wards was justified.

C. The Courts' Opinions.

1. The district court. In granting summary judgment to defendants, the district court focused exclusively on the "proportional representation" defense. The court concluded that "proportional representation bars a section 2 claim" (App. E-8). The court also asserted that "proportional representation" should be measured by the minority group's percentage of the voting-age population (App. E-9).[8]

2. Plaintiffs' first round in the Eighth Circuit. A panel of the Eighth Circuit affirmed summarily without written opinion (App. D-1). Plaintiffs' suggestion for a rehearing *en banc* was denied over Judge McMillian's written dissent, which stated:

> This case raises important legal and factual issues under the Voting Rights Act. In my view, genuine issues of material fact exist making this case wholly unsuited for summary judgment. The district court gave

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[8] The Bosley plaintiffs promptly retained new counsel who filed a Rule 59(e) motion, memorandum, and extensive supporting exhibits, and urged that the trial court take another look. On June 29, 1992, the trial court denied the motion with the observation that the "facts and issues now presented could . . . have been produced at an earlier time" (App. F-3).

> no consideration to, and made no findings concerning, serious allegations and evidence of a violation of §2 of the Voting Rights Act. In particular, I believe the district court should have made detailed findings regarding whether the City of St. Louis intentionally created its aldermanic districts to dilute African-American voting strength in violation of Section 2.

(App. D-3).

3. Proceedings in the United States Supreme Court. The Bosley plaintiffs petitioned for a writ of certiorari on the grounds that (a) proportional representation was not an affirmative defense or a bar to a §2 voting rights claim; (b) proportional representation was not an affirmative defense or a bar to an intentional racial gerrymandering claim; and (c) if proportional representation was a defense to a voting rights claim, the lower courts erred in using voting-age population, rather than total population, as the relevant population measure. On June 30, 1994, the Supreme Court issued a writ of certiorari, vacated the Eighth Circuit's judgment and remanded the case for further consideration in light of *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994).

4. Proceedings in the Eighth Circuit on remand. On May 12, 1995, the same panel reaffirmed. As the lower court read *DeGrandy*, "substantial proportionality *barred* a §2 voting dilution claim" (emphasis added) (App. A-14). The panel upheld the district court's finding of proportionality based on the finding that the 1991 ward map provides the black community with 12 "safe" wards,[9] as well as its use

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[9] It rejects the argument that there is a genuine issue of material fact as to whether the map's 2nd ward, with its 59.4% black voting-age population, is actually an "effective" black ward. Although there had been no analysis of voting behavior of blacks and whites in that ward, the panel concluded that the voting-age population is close enough to the 60% voting-age population

(continued...)

of voting-age population, and not total population, as the appropriate yardstick by which to measure proportionality because the panel saw voting-age population as the measure used by this Court in *DeGrandy* (App. A-15-17).[10]

The panel then turned to plaintiffs' argument that the trial court erred in ruling that "proportional representation" barred plaintiffs' §2 effect claim. The panel held it could affirm on a "ground supported by the record, *whether or not that ground was urged below or passed on by the district court*" (App. A-25; emphasis added). The panel proceeded to do exactly that: it converted defendants' motion for summary judgment on the proportionality affirmative defense to a motion for summary judgment on the merits. It then concluded that since Dr. Jones's affidavit failed to outweigh "the extremely heavy weight" that the proportionality factor must be given, plaintiffs had failed to show that the 1991 ward map had the effect of denying blacks an equal opportunity to participate in the political process and to elect their preferred candidates (App. A-26).

Finally, the panel rejected plaintiffs' intent claim with the conclusion that (a) "it is unclear that intent plays any role in a suit under Section 2"; and (b) "to the extent that intent plays any role in a §2 suit, it does so only in conjunction

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[9] (...continued)
threshold that the panel itself suggests is the benchmark of a "safe" black ward. *Cf.* App. A-4, n. 3.

[10] The panel also found that for purposes of determining proportionality on defendants' motion for summary judgment, the trial court correctly looked at the city as a whole, and not St. Louis' central-corridor area because plaintiffs' "pleading and proof focused citywide," as demonstrated by plaintiffs' assertion that if St. Louis "were reapportioned fairly and without discriminatory effect, blacks would constitute effective voting majorities in fourteen out of the twenty-eight wards of said city" (App. A-21). In fact, the purposeful boundary manipulation identified by Dr. Jones occurred in the "central-corridor" wards.

with a discriminatory effect." Accordingly, the lower court held that since proportionality prevented plaintiffs from proving discriminatory effect, there could be no intentional racial discrimination as a matter of law (App. A-27, n. 18).

On August 9, 1995, the Court of Appeals denied plaintiffs' petition for reconsideration or rehearing *en banc*. Chief Judge Richard S. Arnold and Judges McMillian and Murphy dissented from this denial.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to review three important questions. First, the panel's conclusion that a claim of intentional discrimination no longer plays any role in a §2 challenge conflicts with the holdings of this Court and with those of at least four other circuits. *See City of Richmond, Virginia v. U.S.*, 422 U.S. 358, 378-79 (1975); *Shaw v. Reno*, 113 S.Ct. 2816 (1993); *DeGrandy, supra*; *Miller v. Johnson*, 115 S.Ct. 2475 (1995); *Cousin v. McWherter*, 46 F.3d 568, 572 (6th Cir. 1995); *Nipper v. Smith*, 39 F.3d 1494, 1520 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 1795 (1995); *Barnett v. Daley*, 32 F.3d 1196, 1202 (7th Cir. 1994); *Garza v. County of Los Angeles*, 918 F.2d 763, 766 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). These cases recognize that purposeful racial gerrymandering and invidious discrimination in drawing election districts is actionable under §2 and the Constitution, regardless whether a traditional vote-dilution claim under the §2 results standard can also be established.

Second, if proportionality is to be a defense to a §2 claim, as the lower court concludes, then the lower court's use of voting-age population rather than total population as the measure of proportionality raises a major issue. The text, purposes, and history of the Voting Rights Act, as well as this Court's precedents, require that total population be the

appropriate baseline. Moreover, the lower courts are split on this question, which is crucial to the ongoing administration of the Voting Rights Act.

Third, the panel also concluded that proportionality was a complete defense to a results claim under §2. Yet plaintiffs claimed and it remains factually undisputed that the Board of Aldermen used dramatically different boundary-drawing techniques in the white areas of St. Louis compared to the black areas. Plaintiffs argued that this uneven boundary manipulation constituted a violation of §2. The Eighth Circuit affirmed summary-judgment dismissal of the case before any discovery had been taken and before any factual record had been developed. This Court should grant certiorari to address whether a results claim under §2 can be barred even when redistricters employ dramatically different districting practices in white and black areas of town, with the effect being that black voting power is diluted substantially below the level it would be were districting done evenhandedly, as long as the "bottom line" of the districting plan is that it provides proportionality.

ARGUMENT

I.

THE LOWER COURT'S DECISION THAT PROPORTIONALITY DEFEATS AN INTENTIONAL RACIAL GERRYMANDERING CHALLENGE TO A SINGLE-MEMBER DISTRICT PLAN CONFLICTS WITH THIS COURT'S DECISIONS IN *DEGRANDY*, *SHAW*, AND *MILLER* AND PRESENTS AN ISSUE OF PUBLIC IMPORTANCE THAT REQUIRES CLARIFICATION BY THIS COURT.

This case presents an issue of fundamental importance to the Voting Rights Act; namely, the role of intent claims under §2. The lower court concluded that "it is no longer clear that intent plays any role in a suit under Section 2" (App. A-27, n. 18). In addition, the lower court concluded

that if "intent plays any role," it does so only if a showing of discriminatory effect identical to that required in a §2 results case is also made. The lower court found that the St. Louis plan provides blacks with proportionality, and therefore concluded that plaintiffs' intent claim had to be rejected as a matter of law.

The lower court's holding fundamentally misreads this Court's voting rights jurisprudence, as well as that of other circuits. Moreover, this holding turns the Voting Rights Act on its head by immunizing *intentional* racial discrimination as long as the "bottom line" of a single-member district redistricting plan is proportionality. In effect, the lower court has turned the Voting Rights Act into a ceiling or cap on black representation: as long as proportionality is provided, political actors are free to engage in the most blatant schemes to fragment and pack black population to maximize white political power. This cannot be the law.

When a redistricting plan is "conceived or operated as [a] purposeful device to further racial discrimination," it is actionable under §2 as well as the Fourteenth and Fifteenth Amendments. *City of Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980).

With respect to §2, the circuit courts have uniformly recognized that plaintiffs can challenge a redistricting plan under §2 either on the ground that the plan is intended to deny a minority group equal opportunity or that it has that result. *See e.g.*, *Cousin v. McWherter*, 46 F.3d at 572 (the 1982 amendments "provide two separate claims for relief and . . . plaintiffs must either prove . . . intent or, alternatively, must show that the challenged system or practice . . . results in minorities being denied equal access to the political process"); *Nipper v. Smith*, 39 F.3d at 1520 (under §2 as amended, a plaintiff once again may demonstrate a violation by *either* "(1) . . . subjective discriminatory motive;

. . . or (2) the existence of discriminatory factors demonstrating discriminatory [effect]"); *Barnett v. Daley*, 32 F.3d at 1202 (Judge Posner) ("intent is not required, but it could still be usable to prove a violation that could not be inferred from a discriminatory effect"); *Garza v. County of Los Angeles*, 918 F.2d at 766 (to the extent that a redistricting plan deliberately minimizes minority political power, it may violate both the Voting Rights Act and the equal protection clause).

In *DeGrandy*, this Court explicitly recognized that in the context of a single-member districting plan, the intentional and illegal manipulation of district boundaries to prefer one race of voters over another can occur even where the plan, as a whole, provides minority voters with rough proportionality. 114 S.Ct. at 2659-61. This Court rejected precisely the argument for a "safe harbor" proportionality defense that the lower court adopted here. As this Court observed in *DeGrandy*, if proportionality provides a safe harbor, "the most blatant racial gerrymandering in half of a county's single member districts would be irrelevant under §2 if offset by political gerrymandering in the other half, so long as proportionality was the bottom line." 114 S.Ct. at 2660. Such a result, this Court observed, is "of highly suspect validity" in light of (a) the Court's repeated admonition that "a balanced bottom line does not foreclose proof of discrimination along the way," and (b) the long-recognized principle that an action "aimed at diluting black votes [is] forbidden by §5 regardless of its actual effect." 114 S.Ct. at 2661 (citing *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2334 (1993), and *City of Richmond v. U.S.*, 422 U.S. 358 (1975)); *see also Baird*, 976 F.2d at 360 (while proportionality defeats plaintiffs' "effect claim," proof of intentional discrimination in a §2 vote dilution case overcomes the defense of proportionality). Consistent with these cases and with Congress' pur-

poses, a claim of intentional discrimination under §2 must be actionable regardless of whether a violation of §2's "results" test has occurred.

Racial gerrymandering is actionable not only under §2, but also under the Fourteenth Amendment. In *Shaw v. Reno* and *Miller v. Johnson*, this Court recognized that race cannot be "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." 115 S.Ct. at 2488. As *Miller* held, voters can prevail on an intentional racial gerrymander cause of action under the Fourteenth Amendment by demonstrating "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Ibid.* *Miller* also recognized that white voters may press an intentional racial gerrymandering claim even though they enjoy substantially more than proportional representation and have suffered no discriminatory effect other than the fact that they were classified by race.

This case presents a powerful example of the type of racial gerrymandering forbidden under both *DeGrandy* and *Shaw*. Here, plaintiffs allege that, faced with a growing black population virtually equal in size and in geographical compactness to the white population, defendants purposefully drew the 1991 St. Louis ward boundaries to (a) separate voters into wards by race in order to (b) dilute the minorities' voting strength and (c) maximizing white voting strength for (d) the purpose of preserving white domination over St. Louis' legislative body. Plaintiffs do not rely solely on the facial irregularity of specific wards to support their claim. Plaintiffs point to an array of traditional gerryman-

dering techniques demonstrating that the defendants systematically manipulated the 1992 ward boundaries to capture white voters within specific wards and maximize white voting strength, and to remove black voters from specific wards and minimize their voting strength.

Dr. Jones states in her affidavit, for example, that defendants redrew the boundaries of wards 6, 7, and 17 along racial lines in order to increase white population and decrease black population for the sole purpose of restoring a white voting-age majority where blacks had become a majority or plurality of the population. At this stage of the litigation, her statement stands unrefuted. In addition, defendants drew the boundaries of the 2nd ward in a grossly irregular manner, so that it now extends over seven miles along the city's north riverfront, for the purpose of picking up virtually every white voter who resides on the city's north riverfront. The intent of this boundary manipulation was to maximize the number of wards white voters controlled. These facts are the classic indicia of an intentional racial gerrymander. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).

Plaintiffs also present a textbook claim that the Board of Aldermen purposefully manipulated the ward boundaries to dilute, cancel out, or disadvantage black voters. Plaintiffs' expert's affidavit presented evidence of the type of unevenhanded boundary manipulations that, according to *Voinovich v. Quilter*, 507 U.S. 146 (1993) should be of singular concern in a voting rights challenge to a single-member districting plan—namely that in drawing the 1991 boundaries, defendants intentionally reduced black population in specific wards to enhance white voting strength, systematically "fractured" black voters to cancel out their voting strength and "packed" black voters in neighboring wards to waste

their voting strength. Not one example exists of defendants' similarly reducing white population to enhance black voting strength, or of systematically wasting white votes by fracturing and packing white population. The result was exactly what defendants intended: in a city that is almost evenly divided between whites and blacks, the 17 white alderman adopted a ward map in 1991 that has preserved the 17 white incumbencies through the first half of the decade.[11]

As a consequence of this Court's rulings in *Shaw* and *Miller*, white voters in North Carolina or Georgia or Texas can challenge a districting plan on the basis of allegations that the map was drawn to segregate voters by race, even when the plan provides proportional representation to whites. Surely a §2 intent claim by black plaintiffs that not only alleges that race was the predominant factor in districting but that further alleges and provides detailed evidence of systematic boundary manipulation and uneven-handed "fracturing" and "packing" by a white-majority city council to purposely cancel out or waste black voting strength must be actionable. Yet the lower court rejected this symmetric treatment. The lower court concluded that a bottom line of proportionality foreclosed any need even to examine plaintiffs' proof of intentional discrimination. The lower court equated "proportionality" with "no discriminatory effect" and went on to hold that plaintiffs who could not make out an "effect claim" had no legal basis *by definition* for a claim of intentional discrimination. This holding squarely conflicts with the text, logic, and purpose of the Voting Rights Act, as well as this Court's pronouncements

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[11] In addition, plaintiffs offered undisputed evidence of racial bloc voting; political cohesiveness; depressed socioeconomic status attributable to a history of discrimination in education, housing, and employment; and a history of discrimination in electoral matters. These factors also support a finding of intentional discrimination. *Rodgers v. Lodge*, 458 U.S. 613, 622-27 (1982).

in *Richmond*, *Shaw*, *DeGrandy*, and *Miller*, and holdings of other circuits. *See Cousin*, *Barnett*, *Nipper*, and *Garza*.

II.

IF PROPORTIONALITY IS A DEFENSE TO VOTING RIGHTS CLAIMS, THE LOWER COURTS' USE OF VOTING-AGE POPULATION RATHER THAN TOTAL POPULATION AS THE MEASURE OF PROPORTIONALITY RAISES AN IMPORTANT ISSUE ON WHICH LOWER COURTS HAVE TAKEN DIVERGENT POSITIONS.

A. This Court should resolve the conflict in the lower courts regarding the proper measure of proportionality and should make clear that total population is the legally-relevant baseline.

Lower courts that have attempted to apply the "proportionality" factor to §2 effects challenges to single-member district plans cannot agree on the proper population measure. In *DeGrandy*, this Court left this question open. 114 S.Ct. at 2660, n. 11. In the instant case, the lower court nevertheless read *DeGrandy* to "at least permit, even if [it] do[es] not require, use of the voting age population as the relevant population" (App. A-16). In *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 836 F.Supp. 453, 462 (W.D. Tenn. 1993) (three-judge court), *vacated*, 114 S.Ct. 2657 (1994), *on remand*, 877 F.Supp. 1096 (D.Tenn. 1995) (three-judge court), *aff'd*, 116 S.Ct. 42 (1995), the lower court went one step further and read §2 and *DeGrandy* to *require* the use of voting-age population as the relevant population measure for determining proportionality.

In contrast, other courts have relied upon *Gingles* to adopt total population as the proper measure of proportionality. *See Nash v. Blunt*, 797 F.Supp. 1488, 1498-1502 (W.D.Mo. 1992) (three-judge court), *aff'd*, 113 S.Ct. 1809 (1993); *Jeffers v. Clinton*, 730 F.Supp. 196, 198 (E.D.Ark.

1989) (three-judge court), *aff'd*, 498 U.S. 1019 (1991); and *Barnett v. Daley*, 809 F.Supp. 1323, 1329 (N.D.Ill. 1992), *rev'd*, 32 F.3d 1196 (7th Cir. 1994). In *Barnett*, *supra*, 32 F.3d at 1200, Judge Posner strongly suggested that total population is a more appropriate baseline than voting age population, but did not decide the issue.

Given the lower courts' increasing reliance on proportionality as an important factor in analyzing effect claims in the single-member district context, a writ of certiorari should be issued to resolve this conflict over the appropriate manner of measuring proportionality.

B. The purpose for weighing "proportionality," as well as this Court's precedents and the language of the Act, all point to total population as the proper measure of proportionality.

The lower courts' use of voting-age population to measure proportionality[12] directly conflicts with the language of §2 and decisions of this Court which point to total population as the better measure for proportionality purposes. It is

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[12] While we assume, for the purpose of this petition, that St. Louis' blacks have proportionality as measured by voting-age population, the lower court's treatment of this case in general, and the 2nd ward in particular, is at odds with every teaching of this Court. *See supra*, n. 9. For example, in *Campbell v. Theodore*, 113 S.Ct. 2954 (1993), this Court vacated and remanded the case "for further consideration in light of the position presented by the Acting Solicitor General in his brief of May 7, 1993." In his brief, the Acting Solicitor General stated that the district court's identification of black or white districts requires an in-depth analysis of each district that includes a district-specific analysis of the "extent to which voting is polarized" and "particularized consideration of historical voting patterns, election results, or other data to support treating identified districts as black 'opportunity districts'" (brief at 14 and 15, n. 11). *Accord*, *Growe v. Emison*, 113 S.Ct. 1075, 1085 (1993). No such analysis exists here.

also at odds with the analytical purpose for considering "proportionality" as a relevant factor in a voting rights claim.

When Congress amended §2 in 1982, it expressly noted that "the principle that the right to vote is denied or abridged by dilution of voting strength derives from the one person, one vote reapportionment case of *Reynolds v. Sims*." S.Rep. No. 417, 97th Cong., 2d Sess. 19 *reported in* 1982 U.S. Code Cong. and Admin. News 177, 196. In *Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964), this Court held "[t]he fundamental principal of representative government is one of equal representation *for equal numbers of people* . . ." (emphasis added). This "one-person, one-vote" principle is based on total population. In *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969), the Court recognized that "equal representation *for equal numbers of people* is a principle designed to prevent debasement of voting power and diminution of access to elected officials" (emphasis added). Reapportionment on the basis of total population guarantees equal representation and equal access to our elected officials.

The concept of proportionality or proportional representation as a measure of vote dilution derives from this one-person, one-vote principle. Proportionality, in the context of single-member district redistricting, addresses the question whether district boundaries were drawn in a manner that divides racial groups into districts in proportion to each group's share of the population used in the redistricting process. It casts light on whether the boundaries impact on racial communities evenhandedly or whether they were gerrymandered to benefit one group or another.

In the single-member district context, "proportionality" is entitled to some weight because "proportionality" can be an

indicator of whether district boundaries were drawn in a manner that treats racial groups equally and, therefore, whether the boundaries provide the minority with an *equal* opportunity to participate in the political process and to elect representatives of their choice. Under the single member plan, all residents of the jurisdiction are divided into districts of equal population. If, in this situation, the lines are drawn to divide a geographically compact minority community into the number of districts that is proportional to their share *of the population that was used to apportion the districts*, it is difficult[13] to identify the sense in which the boundaries operate to deny the minority population the "equality of opportunity" that §2 guarantees.

The same is not true, however, where voting-age population and not total population provides the baseline for measuring proportionality. Consider a city in which whites are 50% of the total population, 54% of the voting-age population, and all live on the south side of town; blacks are 50% of the total population, 46% of the voting-age population, and all live on the north side of town. Also assume that the city council is comprised of 50 single-member districts of equal population. Twenty five (50%) white-majority wards (proportionality based on total population) presumptively treats the two groups equally; 27 (54%) white-majority wards (proportionality based on voting-age population) does not. In the latter case, the map drawer can only "stretch" the white population to control two additional wards by "fracturing" black population that could have been used to create two additional black wards and putting them in white majority wards.

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[13] *See DeGrandy*, 114 S.Ct. at 2660-62; *Barnett*, 32 F.3d at 1200-01.

Equal treatment and "equal opportunity," therefore, can never be presumed from the mere presence of proportionality when (a) racial groups are highly segregated; (b) the *Gingles* preconditions (and, in particular, racial polarized voting) exists; and (c) voting-age population is the measure of proportionality. In any urban center in which the races are segregated, proportionality measured by voting-age population equates to a minimum quota of minority wards.

St. Louis is a perfect example of this phenomenon. As the lower court found, ward maps could have been drawn that ranged from 17 white and 11 black wards to 11 white and 17 black wards (App. A-6). Proportionality based on voting-age population equals 11.7 black wards, or a fraction more than the minimum that could be drawn. Proportionality in St. Louis, based on total population, equals 13.3 black wards. A ward map that provides for only 11 or 12 black wards in St. Louis can be drawn only by fracturing black population into neighboring white wards. To conclude that such a map is the benchmark for equal treatment assumes that the non-voting age minority population (which explains the population differences), is represented as effectively by the white voters into whose wards they are fractured as they would be by their parents or their black voting-age neighbors. Once the *Gingles* preconditions are satisfied, however, the court cannot make this assumption precisely because it now knows that the majority votes on the basis of race. *See Barnett*, 32 F.3d at 1200-01.

Indeed, when this Court first addressed the principle of a "proportional representation" defense to a Voting Rights Act claim in *Gingles*, the Court used *total* population, not voting-age population, as its measure: the test for establishing sustained electoral success of the minority community in a multi-member district was whether "black *residents*" had proportional representation. 478 U.S. at 74-77 (empha-

sis added); 478 U.S. at 74, n. 35; *see also United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 166 (1977) (same under §5 of the Act). The Court then observed that in North Carolina's 23rd district, "the last six elections have resulted in proportional representation for *black residents*." *Gingles*, 478 U.S. at 77 (emphasis added). It determined proportional representation by measuring the minority group's percentage of *the total population* (36.3%) with its electoral success rate (one of three electoral representatives). *Gingles*, 478 U.S. at 74, n. 35, and 478 U.S. at 104 (O'Connor, J., concurring); *see Garza*, 918 F.2d at 776 (the use of voting-age population rather than total population discriminates against minorities by diluting "the access of voting-age [minorities] . . . to their representatives, and would similarly abridge the right of . . . minors to petition their representatives"); *Barnett*, 32 F.3d at 1200 (total population may be a better index than voting-age population); *DeWitt v. Wilson*, 856 F.Supp. 1409, 1415 (E.D.Cal. 1994) (three-judge court), *aff'd in part and appeal dismissed in part*, 115 S.Ct. 2637 (1995) (rejecting the equal protection claim that the use of total population "unduly minimizes white voter strength" since whites have higher registration rates on the ground that "population, not voter registration, is the appropriate basis for apportioning districts"). As long as the wards are apportioned on the basis of total population, proportionality, as evidence of equal treatment, is best measured by the same population base.

The Act itself supports the use of total population in measuring proportionality. Section 2 disavows a minority's right to proportional representation in the following language: "Nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion *in the population*" (emphasis added). While this proviso "speaks to the success of minority candidates" (*see*

114 S.Ct. at 2658, n. 11), it also addresses the measure of electoral power of minority voters. This language has its origins in *City of Mobile*, 446 U.S. at 66-67, and this Court's recognition that in proving that a reapportionment purposefully minimized or cancelled out the voting potential of racial or ethnic minorities, "it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers." In other words, minority plaintiffs must show more than the fact that they have lacked the electoral power to elect a proportional number of candidates of their choice. As is clear from the debates over the 1982 amendments that led to the amended "results" standard, Congress viewed "proportional representation" as a measure of a minority's electoral power. *See* S.Rep. No. 417, 97th Cong., 2d Sess. 19, at 340.

If total population is abandoned as the proper measure and replaced with the "electorate," the courts will have to resolve numerous further questions. For example, rather than using voting-age population to define the "electorate," courts might be asked to use citizen voting-age population: only the latter represents the actual electorate. In St. Louis, the voting age citizen population is approximately 55% white and 44% black. U.S. Dept. of Commerce, 1990 Census Summary Tape File 1-B and 3-A. Using *this* measure, blacks do not have proportionality under the current districting plan. Moreover, according to the census, the adjusted citizen voting-age population (or the real "electorate") is 53.5% white and over 45% black—yet whites have voting-age majorities in 57.1% of the wards and have elected their alderman of choice in 60.7% of the wards while blacks have a voting-age majority in 42.8% of the wards and have elected their candidate of choice in 39.2%. Total population provides a principled, easily-administrable standard of representation in the Voting Rights Act context just as it

has in the one-person, one-vote context. Once courts begin to attempt to impose a different standard, it will fuel continual litigation under §2.[14]

III.

PROPORTIONALITY DOES NOT DEFEAT PLAINTIFFS' §2 RESULTS CLAIM WHEN DIFFERENT BOUNDARY-DRAWING PRACTICES WERE USED IN THE BLACK COMMUNITY THAN WERE USED IN THE WHITE COMMUNITY WHICH RESULTED IN MINIMIZING BLACK VOTING STRENGTH WHILE MAXIMIZING WHITE VOTING STRENGTH.

Over the past two terms, in *Growe*, *Voinovich*, and *DeGrandy*, this Court has articulated the appropriate framework for analyzing §2 result challenges to single-member district plans. According to the Court, "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *DeGrandy*, 114 S.Ct. at 2655, *quoting Voinovich*, 113 S.Ct. at 1157. Justice O'Connor, writing for a unanimous court in *Voinovich*, explained that in the single-member district context, "the usual device for diluting minority voting power is the manipulation of district lines," and that in single-member districts:

> dilution of racial minority group voting strength may be caused either by dispersal of blacks into districts in which they constitute an ineffective minority of voters [fracturing] or from the concentration of blacks into

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[14] In light of the clear and convincing evidence that black population was seriously undercounted in the last census, any proportionality analysis works to their detriment. *See City of New York v. U.S. Dept. of Commerce*, 822 F.Supp. 906, 913 (E.D.N.Y. 1993), *cert. granted*, 116 S.Ct. 38 (1995); *Assembly of State of Cal. v. U.S. Dept. of Commerce*, 968 F.2d 916, 917 (9th Cir. 1992). This unfairness is obviously compounded by the use of voting-age population as the measure.

> districts where they constitute an excessive majority [packing].

DeGrandy, 114 S.Ct. at 2659 (emphasis added). St. Louis presents precisely the type of inconsistent treatment that supports a §2 violation, even in the face of proportionality.

For example, the 1991 ward boundaries "fracture" blacks *but not* whites. In the seven central-corridor wards reside 100,230 persons, of whom 34,685 (34.6%) are black. These 34,685 blacks, who could be part of black-majority wards, are, instead dispersed into seven wards in each of which they constitute an ineffective voting minority. *See supra* at 6-7. Yet, there is no comparable dispersion of white voters. All of the white voters in this seven central-corridor ward area were placed in white-majority wards. Similarly, the current map distributes whites across the wards in a far more efficacious fashion than blacks. Over 90% of the city's white population reside within a contiguous boundary on the city's south side and north along the Mississippi River. Likewise, over 90% of the black population reside within a contiguous boundary on the city's north side and west of the riverfront. The 17 wards that have elected white aldermen are, on average, 79% white; while the 11 wards that have elected black aldermen are, on average, 93.5% black in population. This disparate treatment is not dictated by the hyper-segregated housing pattern or by any traditional redistricting standards. A map that "packed" and/or "fractured" whites and blacks evenhandedly, and used traditional redistricting standards, would result in the same number of black wards as white wards, thus requiring cross-racial cooperation in matters of local governance.

Finally, defendants manipulated ward boundaries to restore white voting-age majorities in wards that had become majority or plurality black and did not need to be redrawn, but never created a black voting-age majority ward

where whites were a majority or plurality of the population. Unevenhanded boundary manipulation of this sort denies blacks the opportunity to participate equally in the political process.

This Court should be aware that absolutely no discovery or factual development has yet taken place on these §2 result claims. The Eighth Circuit has handled this case in a procedurally novel manner. The district court granted summary judgment on the legal ground that "proportional representation" was a complete defense to all §2 claims; the Eighth Circuit initially affirmed on this ground. Yet when this Court vacated and remanded, the Eighth Circuit reaffirmed summary judgment on the completely new ground that plaintiffs could not prove their case on the merits.[15] This ground was never briefed or argued by the parties, either in the initial district court proceeding or before the Eighth Circuit.

The Eighth Circuit felt free to ignore the procedural posture of a summary judgment motion because, in its view, it "reviews judgments, not opinions." Thus, an appellate court can affirm summary judgment on grounds neither "urged below or passed on by the district court" (App. A-25). Such an understanding of the relationship between appellate and district courts represents a radical departure from the controlling decisions articulated by this Court and those of every other circuit. Those decisions uniformly and properly condemn appellate-level summary judgment on factual issues not specifically litigated below.

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[15] Even this limited record should have been enough if the Eighth Circuit adhered to this Court's teaching that, at this summary stage, Dr. Jones's evidence "is to be believed and all justifiable inferences are to be drawn in [the non-movant plaintiffs'] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Dr. Jones's affidavit clearly raises genuine disputes over whether the boundaries diluted black voting strength. But even if it did not, that issue was never raised in the summary judgment motion, briefs, or arguments. Moreover, the predicate for the rare instance of appropriate appellate review of a trial court's summary judgment on a ground that was never urged below is a determination that the non-moving party had (a) adequate notice of the issue on which evidence is being demanded; (b) full discovery on the issue that forms the basis for the motion; and (c) a fair opportunity to develop and present all pertinent evidence. *See Fountain v. Filson*, 336 U.S. 681, 683 (1949); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *see also Hartman v. Board of Trustees of Community College Dist. No. 508, Cook County, Ill.*, 4 F.3d 465, 469 (7th Cir. 1993); *Bonilla v. Nazario*, 843 F.2d 34, 37 (1st Cir. 1988); *Tavery v. U.S.*, 32 F.3d 1423, 1427, n. 5 (10th Cir. 1994); *Buckingham v. U.S.*, 998 F.2d 735, 740 (9th Cir. 1993); *John Deere Co. v. American Nat. Bank, Stafford*, 809 F.2d 1190, 1191 (5th Cir. 1987); *Mariash v. Morrill*, 496 F.2d 1138, 1145 (2d Cir. 1974). If the practice were otherwise, plaintiffs opposing a summary judgment on a specific issue would have no choice but to offer evidence and argument on every conceivable element of their case.

Plaintiffs have had no discovery as of yet. Nor were they ever on notice that they were going to have to *prove the facts* of their §2 results claim at this stage. At a minimum, this Court should grant the writ, vacate, and remand the decision below for analysis of the totality of the circumstances based on a fully-developed record in light of this Court's most current voting rights jurisprudence.

Alternatively, this Court should hold this petition pending disposition of the appeal in *Voinovich v. Quilter*, 116 S.Ct. 42 (1995).

CONCLUSION

For all of the reasons stated above, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SHARON TYUS; FREEMAN BOSLEY, SR.; BERTHA MITCHELL; IRVING CLAY, JR.; and CLAUDE TAYLOR,

Petitioners,

v.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and CITY OF ST. LOUIS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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52 pp

INDEX TO APPENDICES

	PAGE
Opinion of the Court of Appeals for the Eighth Circuit affirming district court's grant of summary judgment	A-1
Eighth Circuit's order denying petitioners' petition for rehearing *en banc*	B-1
United States Supreme Court's order granting petitioners' petition for a writ of certiorari, vacating prior Eighth Circuit judgment, and remanding case for further consideration in light of *Johnson v. DeGrandy*	C-1
Prior Eighth Circuit opinion with order denying petitioners' suggestion for rehearing *en banc*, with written dissent by Judge McMillian	D-1
District court opinion granting defendants' motion for summary judgment	E-1
District court opinion denying plaintiffs' Rule 59(e) motion to alter or amend	F-1
Section 2 of the Voting Rights Act, as Amended, 42 U.S.C. §1973	G-1
Racially-coded map of the City of St. Louis with the 1991 ward boundaries	H-1

APPENDIX A

AFRICAN AMERICAN VOTING RIGHTS LEGAL DEFENSE FUND, INC.; Charles Q. Troupe; Angela D. Walton, Plaintiffs,

Freeman Bosley, Jr.; Bertha Mitchell, Appellants,

Ida Ford; Charles Parker; Albert Banks; Carol Page; Luretta Hawkins; Elmer Otey; Jacqueline McGill, Plaintiffs,

Sharon Tyus, Appellant,

Laura Gordon; Alexis Johnson, Plaintiffs,

Irving Clay; Claude Taylor, Appellants,

v.

Thomas A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; Vincent C. Schoemehl, in his capacity as Mayor, City of St. Louis, Missouri; Board of Aldermen, City of St. Louis, Missouri; City of St. Louis, Appellees.

American Civil Liberties Union; United States of America, Amicus Curiae.

No. 92-3826.

United States Court of Appeals, Eighth Circuit.

Submitted April 12, 1995.

Decided May 12, 1995.

Action was brought claiming that city's redistricting ordinance, which established ward boundary lines for selecting aldermen and for selecting political party committees, violated, inter alia, Voting Rights Act. The United States District Court for the Eastern District of Missouri, Jean

C. Hamilton, J., granted summary judgment in favor of city, and plaintiffs appealed. The Court of Appeals, 999 F.2d 1301, affirmed. On petition for writ of certiorari, the United States Supreme Court, ____ U.S. ____, 114 S.Ct. 2776, 129 L.Ed.2d 888, granted petition, vacated and remanded. On remand, the Court of Appeals, Magill, Circuit Judge, held that: (1) district court, in ruling on summary judgment motion, did not abuse its discretion in refusing to consider materials untimely submitted by plaintiffs, even assuming existence of strategic disagreements between plaintiffs and their counsel; (2) it was not error to use voting age population, rather than total population, as relevant population for assessing proportionality regarding vote dilution claim; (3) plaintiffs' pleadings and proofs before district court focused upon citywide area, not merely five central corridor wards and, thus, proper geographic scope for purposes of proportionality analysis was entire city; and (4) even assuming that district court, in ruling on vote dilution claim, focused its opinion too heavily upon proportionality, which was only one of several factors, proper consideration of proportionality factor established that no Voting Rights Act violation had occurred.

Affirmed.

* * * * *

Judson Miner, Chicago, IL, argued, for appellant.

Julian Bush, St. Louis, MO, argued (Tyrone A. Taborn, Edward Hanlon and Michael A. Garvin, on the brief), for appellee.

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGILL, Circuit Judge.

This case is before us for a second time as a result of a remand by the Supreme Court. Freeman Bosley, Jr.,

and four other individual plaintiffs (collectively, "the Bosley plaintiffs") appealed the district court's[1] grant of summary judgment to the City of St. Louis and various officials (collectively, "the St. Louis defendants") in this Voting Rights Act § 2 challenge to a 1991 reapportionment plan. Because we find that the materials submitted to the district court fail to demonstrate the existence of a genuine issue of material fact as to whether the 1991 reapportionment plan violates § 2, we affirm.[2]

I. BACKGROUND

The city of St. Louis is governed by a Board of Aldermen consisting of twenty-eight aldermen elected from twenty-eight single member wards. Article I, section 3 of the St. Louis City Charter requires the St. Louis Board of Aldermen to redraw the boundaries of the aldermanic wards in accordance with federal decennial census figures. App. at 70.

These census figures reveal the changing composition of the city of St. Louis and the effects of this change upon the composition of the aldermanic wards. According to the 1970 census, used for the 1971 districting scheme, the St. Louis population looked like this:

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[1] The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri.

[2] We assume without deciding that all the Bosley plaintiffs have standing to challenge the reapportionment scheme. Because we find no violation of § 2, we express no view on the St. Louis defendants' challenge to the constitutionality of that section.

	% of Total Population	% of Voting Age Population	% of Aldermen Under 1971 Plan[3]
Black	40.9	35.0	35.7
White	58.7	64.5	64.3
Other	0.5	0.5	0.0

App. at 33-34, 60, 64-67. This population changed over the ensuing ten years, and by 1980 the census figures which were the basis for the 1981 reapportionment painted a different picture:

	% of Total Population	% of Voting Age Population	% of Aldermen Under 1981 Plan
Black	45.6	40.3	39.3
White	53.5	58.9	60.7
Other	0.9	0.9	0.0

App. at 32-33, 58, 64-67. The present dispute arose when the Board attempted to follow the mandate to reapportion aldermanic wards in 1991. According to the 1990 census figures, the population of the city of St. Louis breaks down as follows:

[3] Where the record contains figures for the number of black aldermen, we use these figures, as they denote the actual level of representation. Where such figures are not contained in the record, we use "safe wards" which denote the potential level of representation. In light of the uncontested presence of the three *Gingles* factors, discussed *infra*, these two measures should be virtually identical as each safe black ward will elect a black alderman as its candidate of choice.

	% of Total Population	% of Voting Age Population	% of Safe Wards Under 1991 Plan[4]
Black	47.5	42.7	42.9
White	50.9	55.8	57.1
Other	1.6	1.5	0.0

App. at 32, 45, 56.

The population of St. Louis is remarkably segregated. Over 90% of the white population is concentrated in the south and northeastern portions of the city, while the black population is concentrated in the northern and northwestern portions of the city. With the exception of a "corridor" through the central portion of the city, and another corridor along the Mississippi River in the northeast part

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[4] We define a "safe ward" as one in which a black majority has a practical opportunity to elect the candidate of its choice. A simple majority is not always sufficient to provide this opportunity:

> We note . . . that a guideline of 65% of total population (or its equivalent) has achieved general acceptance in redistricting jurisprudence.
>
> A guideline of 65% of total population has been adopted and maintained for years by the Department of Justice and by reapportionment experts and has been specifically approved by the Supreme Court in circumstances comparable to those before us as representing the proportion of minority population reasonably required to ensure minorities a fair opportunity to elect a candidate of their choice. This figure is derived by augmenting a simple majority with an additional 5% for young population, 5% for low voter registration and 5% for low voter turn-out, for a total increment of 15%. This leads to a total target figure of 65% of total population. Obviously if voting age population statistics are used, 5% would drop out of the formula, leaving something in the vicinity of 60% of voting age population as the target percentage.

Ketchum v. Byrne, 740 F.2d 1398, 1415 (7th Cir. 1983), *cert. denied*, 471 U.S. 1135, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985). Thus, we conclude that either 60% of the voting age population or 65% of total population is reasonably sufficient to provide black voters with an effective majority.

of the city, at least 75% of the population of almost every St. Louis neighborhood is a single race. Because of the combined effects of geography and segregation, the 1991 aldermanic wards may be drawn to create anywhere from eleven to seventeen safe black wards.

At the time the 1991 redistricting process began, the Board of Aldermen consisted of seventeen white incumbents and eleven black incumbents. After rejecting a plan proposed by Ward 3 Alderman Freeman Bosley, the Board approved a plan which provided for twelve safe black wards. App. at 31-32.

The Bosley plaintiffs, dissatisfied with a failure to obtain fourteen safe black wards, filed a complaint seeking declaratory and injunctive relief, alleging that the St. Louis defendants manipulated ward boundaries by "packing"[5] and "cracking"[6] black voters for the purpose and with the effect of minimizing the electoral potential of black voters in St. Louis, in violation of § 2 of the Voting Rights Act and the First, Thirteenth, Fourteenth and Fifteenth Amendments. In February, the St. Louis defendants moved for summary judgment on the grounds that the plan's maximum deviation from the ideal ward[7] was

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[5] Packing is dilution of minority voters' strength by concentrating it "into districts where they constitute an excessive majority." *Voinovich v. Quilter*, ____ U.S. ____, ____, 113 S.Ct. 1149, 1155, 122 L.Ed.2d 500 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 46 n. 11, 106 S.Ct. 2752, 2764 n.11, 92 L.Ed.2d 25 (1986)).

[6] Cracking, fracturing or fragmenting is dilution of the strength of minority voters by "[d]ividing the minority group among various districts so that it is a majority in none[.]" *Voinovich*, ____ U.S. at ____, 113 S.Ct. at 1155 (quoting *Gingles*, 478 U.S. at 46 n. 11, 106 S.Ct. at 2764 n. 11).

[7] The population of an "ideal ward" is calculated by dividing the total population of St. Louis (396,685) by the number of aldermanic wards (28). This computation yields an ideal ward populated by 14,167.3 persons. App. at 46.

+ 3.98% and − 4.32%, for a total range of 8.27% and a standard deviation of 2.83%. App. at 50. The St. Louis defendants maintained that the wards had been drawn in such a way as to provide substantial proportionality[8] for black voters, and that the districting plans had resulted in such proportionality since 1971.

Four affidavits were attached to the St. Louis defendants' motion. Fred Steffen, Clerk of the Board of Aldermen of the City of St. Louis, provided information concerning the identity and race of aldermen who represented each ward for 1971-1992. App. at 63-67. Pelham J. Robinson, Registrar of the City of St. Louis, provided relevant sections of the St. Louis City Charter and a copy of Ordinance 62476, which established the ward boundaries under the 1991 reapportionment plan. App. at 68-83. Stephen Umsheid stated that in a few cases ward boundaries were drawn "through" census blocks, and he explained the method used in such cases. These three affidavits provided the legal and factual background for the statistical analysis contained in the affidavit of Donald L. Davison, the defendants' expert. Davison conducted extensive statistical analyses of the population of St. Louis. Davison analyzed the total population, the voting age population and the Board of Aldermen in terms of racial composition and compared the percentages of each population to the number of aldermen and safe wards. These comparisons led Davison to conclude that the percentage of safe black wards (or black aldermen) was substantially proportional to the percentage of blacks in the voting age population.

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[8] Proportionality "links the number of majority-minority voting districts to minority members' share of the relevant population." *Johnson v. DeGrandy*, ___ U.S. ___, ___ n. 11, 114 S.Ct. 2647, 2658 n.11, 129 L.Ed.2d 775 (1994).

The Bosley plaintiffs opposed the motion by filing an affidavit from their own expert, Dr. Charlene Jones. Jones did not take issue with Davison's analysis of proportionality *if* voting age population is used as the relevant population. Rather, Jones took issue with Davison's choice to use voting age population rather than total population in his analysis of proportionality. Jones stated that blacks have historically been underrepresented in terms of total population, and therefore no proportionality existed. Jones noted the continued effects of past discrimination, a factor under *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and stated that black voting power had not been maximized. Jones also objected to the Umsheid affidavit, claiming that Umsheid used a flawed methodology and improperly adjusted census figures. Jones further objected to the drawing of ward boundaries so that census blocks were split among two wards.

On May 28, the Bosley plaintiffs moved for leave to file a memorandum and additional affidavits in opposition to the St. Louis defendants' motion for summary judgment. The district court denied the motion for leave to file additional materials and granted the defendants' motion for summary judgment on all plaintiffs' claims. The Bosley plaintiffs filed a Rule 59(e) motion to alter or amend the judgment that again sought to introduce additional factual materials. This motion was denied and the plaintiffs appealed the dismissal of their Voting Rights Act claims, arguing that the district court (1) abused its discretion in denying the motion for leave to file a memorandum in opposition; and (2) erred in granting summary judgment on the Voting Rights Act § 2 claims. On August 4, 1993, we affirmed the district court's summary judgment pursuant to 8th Circuit Rule 47B. *African Am. Voting Rights Legal Defense Fund v. Villa*, 999 F.2d 1301 (8th Cir. 1993)

(*AAVR*). We denied a petition for rehearing en banc over a dissent by Judge McMillian. *Id.* at 1302.

On June 30, 1994, the Supreme Court decided *Johnson v. De Grandy*, ____ U.S. ____, 114 S.Ct. 2647, 129 L.Ed. 2d 775 (1994). On the same day, the Supreme Court granted certiorari in *AAVR*, vacated the panel opinion, and remanded the case for further consideration in light of *Johnson*. *Tyus v. Bosley*, ____ U.S. ____, 114 S.Ct. 2776, 129 L.Ed.2d 888 (1994). We have carefully considered the Supreme Court's decision in *Johnson* and have concluded that the district court's grant of summary judgment was consistent with the principles enunciated in *Johnson*. Accordingly, we affirm.

II. DISCUSSION

The Bosley plaintiffs argue that the district court erred in three respects when it granted summary judgment to the St. Louis defendants. The plaintiffs use *Johnson* to raise three specific challenges to the district court's analysis of proportionality. First, the Bosley plaintiffs argue that the district court improperly used voting age population rather than total population to define the "relevant population" for assessing proportionality. Second, they claim that the district court erred by including the entire city of St. Louis, rather than only the allegedly challenged areas, when determining the number of majority-minority wards to be considered in measuring proportionality. Finally, they argue that the district court gave excessive weight to the proportionality factor by treating it as a per se bar to a § 2 voting dilution claim. However, before we can address the merits of the Bosley plaintiffs' Voting Rights Act claims, we must decide whether the materials that were untimely filed should

have been considered by the district court when determining whether a genuine issue of material fact existed.

A. Did the district court abuse its discretion in refusing to consider the May 28 materials?

The St. Louis defendants filed their motion for summary judgment on February 19, 1992. Local Rule 7(B)(2) provides:

> A party opposing a motion for summary judgment under Fed.R.Civ.Pro. 56 shall serve and file any written brief or memorandum of law and any appropriate extra-pleading materials within twenty days after being served with the motion [for summary judgment].

The Bosley plaintiffs moved for an extension of time to respond and filed the Jones affidavit on April 27, the last day of the extension. More than thirty days later after the extension, and more than ninety days after the original twenty days provided in the local rule, the Bosley plaintiffs sought leave to file a memorandum and affidavits in opposition.

The district court has discretion whether to accept or reject such untimely filed materials. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 894-98, 110 S.Ct. 3177, 3191-94, 111 L.Ed.2d 695 (1990). A district court's refusal to accept untimely filed materials will not be reversed for abuse of discretion unless the proponent of the materials has made an affirmative showing of excusable neglect. *Id.*

The Bosley plaintiffs submitted a five-paragraph pro se motion to file a memorandum in opposition to the defendants' motion for summary judgment. Citing the importance of the issue, the plaintiffs requested permission to file the memorandum. Although the motion noted the original counsel's failure to file a memorandum or additional

affidavits, it was devoid of any reason for this failure to act. Indeed, only by viewing the motion very charitably may any explanation be found. The closest thing to an explanation contained in the motion is the opening paragraph, which states that:

> [d]ue to fundamental differences with counsel, we [the Bosley plaintiffs] dismissed our attorneys and advised them of our decision to withdraw from this case so that we could join as plaintiffs in another voting rights case challenging the same St. Louis Ward map brought by another attorney whose strategies we agree with.

App. at 105. This does not explain why the untimely filed materials were not filed on or before April 27; it only explains the reason for the plaintiffs' decision to file the materials on May 28 after dismissing the original attorney. However, assuming that the same strategic disagreements existed during the period leading up to the filing of the Jones affidavit, the district court decision is not an abuse of discretion. The explanation given by the Bosley plaintiffs is an explicit reference to disagreements concerning strategy, and tactical decisions do not amount to affirmative showings of excusable neglect under Rule 6(b).[9] *See Slaughter v. Southern Talc Co.*, 919 F.2d 304, 307 (5th Cir. 1990) (tactical reasons do not amount to excusable neglect). We believe that the district court did not abuse its discretion when it refused to accept these materials which were submitted in violation of the local rule. *Lujan*, 497 U.S. at 894-98, 110 S.Ct. at 3191-94 (no abuse of discretion where district court refused affidavits submitted

[9] Although this analysis concerns the May 28 motion, we find that the district court decision concerning the June 29 Rule 59(e) motion was not an abuse of discretion for similar reasons.

in violation of briefing order and Fed.R.Civ.P. 6(d) and 56(c)); *see, e.g., Orsi v. Kirkwood*, 999 F.2d 86, 91-92 (4th Cir. 1993) (no abuse of discretion where district court refused untimely filed affidavits); *Slaughter*, 919 F.2d at 307 (no abuse of discretion where district court refused affidavits submitted in violation of Fed.R.Civ.P. 6(d) and 56(c)); *Western Chance No. 2 v. KFC Corp.*, 957 F.2d 1538, 1544 (9th Cir. 1992) (no abuse of discretion where district court refused affidavit submitted in violation of local rule); *Useden v. Acker*, 947 F.2d 1563, 1571 (11th Cir. 1991), *cert. denied*, ____ U.S. ____, 113 S.Ct. 2927, 124 L.Ed.2d 678 (1993) (same). Thus, the district court did not abuse its discretion when it considered the record as consisting of the Jones affidavit and the materials accompanying the St. Louis defendants' motion for summary judgment. Accordingly, we consider the question whether the Jones affidavit and the defendants' materials create a genuine issue of material fact as to whether the 1991 reapportionment plan violated § 2.

B. Did the district court err in granting the St. Louis defendants summary judgment on the basis of sustained proportionality?

Summary judgment is appropriate when there is no disputed issue of material fact and the moving party is entitled to judgment as a matter of law. *Egan v. Wells Fargo Alarm Servs.*, 23 F.3d 1444, 1446 (8th Cir.), *cert. denied*, ____ U.S. ____, 115 S.Ct. 319, 130 L.Ed.2d 280 (1994); Fed.R.Civ.P. 56(c). We review a grant of summary judgment de novo, applying the same standard as the district court. *Egan*, 23 F.3d at 1446. Material facts are determined with reference to the substantive law governing the claim.

Section 2 of the Voting Rights Act of 1965, *codified as amended*, 42 U.S.C. § 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title [concerning language minorities], as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population.

42 U.S.C. § 1973.

In *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court imposed structure upon this totality of the circumstances approach by looking to the Act's legislative history and enunciating a series of factors to be considered. These factors, known as the *Gingles* factors, include: (1) whether the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2)

whether the minority group is "politically cohesive"; and (3) whether "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . .—usually to defeat the minority's preferred candidate." *Id.* at 50-51, 106 S.Ct. at 2766-67.

Although *Gingles* involved a challenge to a multi-member districting scheme, *Voinovich v. Quilter*, ___ U.S. ___, ___-___, 113 S.Ct. 1149, 1157-58, 122 L.Ed.2d 500 (1993), and *Growe v. Emison*, ___ U.S. ___, ___-___, 113 S.Ct. 1075, 1083-84, 122 L.Ed.2d 388 (1993), make it clear that the *Gingles* factors are preconditions to a challenge of a single member districting scheme. *Johnson* reaffirms that the *Gingles* factors are preconditions in a vote dilution challenge to a single member districting scheme. *Johnson*, ___ U.S. at ___, ___, 114 S.Ct. at 2655, 2657.

In *Johnson*, the Supreme Court held that substantial proportionality barred a § 2 voting dilution claim where there was a history of discrimination and two percentage point difference between the percentage of Hispanics in the voting age population (47%) and the percentage of Hispanic-majority districts (45%). The Supreme Court also held that "[w]hile such proportionality is not dispositive in a challenge to single member districting, it is a relevant fact in the totality of circumstances." *Id.* at ___, 114 S.Ct. at 2651.

Neither party makes any claim that any of the three *Gingles* preconditions is not satisfied. Rather, as in *Johnson*, the dispute centers around whether proportionality has been established and, if so, whether proportionality defeats the Bosley plaintiffs' § 2 claim despite the satisfaction of the *Gingles* factors and the *White* factor of continuing effects of past discrimination. *See id.* at ___, ___, 114 S.Ct. at 2655, 2658. The Bosley plaintiffs'

claimed errors may be grouped into two categories. The first two arguments challenge the district court's conclusion that proportionality existed. The third argument challenges the district court's treatment of proportionality, assuming that proportionality exists. We address each claimed error in turn.

1. Is there substantial proportionality?

a. Is the total population or the voting age population the relevant population for assessing proportionality?

The parties are in agreement on the material facts. They applied the same criteria for determining whether blacks constituted an effective voting majority in a ward. App. at 87 (Jones affidavit); 32 (Davison affidavit). They agree that it is possible to draw boundaries so as to create fourteen wards with effective black majorities. App. at 89 (Jones affidavit); 22, 23 (defendants' Answer). The Jones affidavit did not take issue with Davison's analysis of proportionality *if* voting age population is used. Rather, Jones argued that Davison's analysis of proportionality was defective because Davison used voting age population rather than total population. App. at 90.

The Jones affidavit fails to create a genuine issue of material fact as to the existence of proportionality because Jones' premise that total population must be used as the basis for proportionality analysis is incorrect under *Johnson*. Jones states that blacks have historically been underrepresented in terms of total population. App. at 90-91. The Davison affidavit does not dispute this, and we assume arguendo that blacks have been underrepresented in terms of total population. However, *Johnson* instructs us to look to voting age population to perform proportionality analysis. Accordingly, we reject the Bosley plaintiffs'

claim that the district court erroneously focused on the voting age population rather than the total population when assessing proportionality.

In the first paragraph of *Johnson*, the Supreme Court framed its holding as:

> We hold that no violation of section 2 can be found here, where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly **proportional to the minority voters' respective shares in the voting age population.**

____ U.S. at ____, 114 S.Ct. at 2651 (emphasis added). *Johnson* consistently defines the relevant population as the voting age population. *See, e.g., id.* at ____, ____ & n. 11, ____ n.18, 114 S.Ct. at 2654, 2658 & n. 11, 2662 n. 18, 2663. Although footnote 11 of *Johnson* refuses to resolve the issue of what is the relevant population in a vote dilution claim, the repeated references to voting age population, coupled with the ultimate holding of *Johnson*, at least permit, even if they do not require, use of the voting age population as a relevant population. *Johnson* clearly stands for the proposition that voting age population is *a* relevant population for proportionality purposes despite *Johnson*'s refusal to hold that it is *the only* relevant population. Subsequent cases have unanimously interpreted *Johnson* as approving the use of voting age population as a relevant population. *See, e.g., NAACP v. Austin*, 857 F.Supp. 560, 569 (E.D.Mich. 1994) ("In assessing proportionality we use voting-age population figures, as the Supreme Court did in *De Grandy*"); *see also Shaw v. Hunt*, 861 F.Supp. 408, 440 n. 28 (E.D.N.C.), *petition for cert. filed*, 63 U.S.L.W. 3439 (U.S. Nov. 21, 1994) (No. 94-923); *Vera v. Richards*, 861 F.Supp. 1304, 1339 n. 49 (S.D. Tex.) (three-judge district court), *appeal filed*, 63 U.S.L.W.

3388 (U.S. Oct. 31, 1994) (No. 94-805). Accordingly, we hold that the district court's use of voting age population was consistent with *Johnson* and was not error.[10]

We hold that under the 1991 plan, proportionality exists between the percentage of blacks in the voting age population (42.7%) and the percentage of safe black wards (42.9%, or 12 out of 28 wards).[11] This proportionality has existed since 1971: Under the 1971 plan, the black voting age population was 35.0% of the total voting age popula-

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[10] We note that the cases cited by the Bosley plaintiffs as support for their argument that total population is the only relevant population are "proportional representation" cases. *Johnson* carefully distinguishes proportionality from proportional representation, the two concepts that the Bosley plaintiffs now attempt to merge. *See Johnson*, ___ U.S. at ___ n. 11, 114 S.Ct. at 2658 n. 11.

[11] The United States as amicus curiae and the Bosley plaintiffs contend that there is a genuine issue of material fact as to whether majority-minority districts numbered eleven or twelve. We reject this argument. The complaint refers to "only 12 65% majority black wards." App. at 15. The Davison and Jones affidavits also indicate that the ward at issue (Ward 2) was a safe black ward. In fact, plaintiffs' expert Jones states that blacks were packed into Ward 2. App. at 86, 88. This evidence completely fails to create a genuine dispute.

Our analysis would notchange were we to consider the materials belatedly submitted concerning Ward 2. These materials indicate that black voters have a majority of 59.4% of the voting age population in Ward 2. However, black voters have a majority of 65.4% of the total population of Ward 2, thereby satisfying the criteria for effective participation. Moreover, we note that the 60% figure is merely a guideline, not an absolute threshold, and we believe that the 0.6% difference is not significant. *Ketchum*, 740 F.2d at 1418. Thus, even if a genuine dispute exists, it does not concern a material fact. We decline the Bosley plaintiffs' invitation to speculate about the meaning of the results of an election in a pre-1991 ward where blacks had only a 58.4% majority, where the election was characterized by low black voter turnout, and where there has been no showing that the defeated candidate was the minority-preferred candidate.

tion, and 35.7% (or 10 out of the 28 wards) were represented by black aldermen. App. at 33-34. Black representation *exceeded* black population by 0.7%. Under the 1981 plan, the black voting age population was 40.3% of the total voting age population and percentage of black aldermen was 39.3% (or 11 out of the 28). App. at 32-33. This difference is half of the 2.0% difference approved in *Johnson*. *Johnson*, ___ U.S. at ___, 114 S.Ct. at 2658 (no denial of equal opportunity where Hispanics were effective voting majority in 45% of districts and constituted 47% of the voting age population). We believe the 1991 plan provides continued proportionality, and that the twenty-year history of proportionality (1971-1991) is of sufficient duration to be considered as "sustained."[12] Accordingly, we hold that the district court acted in a manner consistent with *Johnson* when it examined voting age population to conclude that the St. Louis defendants demonstrated sustained proportionality.

b. Does the proper geographic scope consist of the entire city of St. Louis or the five central corridors?

We also believe that the district court's focus upon the entire city of St. Louis rather than upon the five central corridor wards was consistent with *Johnson*. The Bosley plaintiffs argue that *Johnson* requires a focus solely upon the contested areas, which they equate with the five

[12] Due to the schedule of elections, there is a delay between the adoption of a redistricting plan and the first election under that plan. For example, the first election under the 1971 plan occurred in 1973. The first election under the 1991 plan would not have occurred until 1993. Thus, the terms of the aldermen elected under the 1971-1991 plans actually spanned from 1973-1993.

wards. We agree that *Johnson* stands for the proposition that the proper geographic scope for the comparison is the scope that is pleaded in the complaint and subjected to proof. However, we disagree with the Bosley plaintiffs' revised characterization of their challenge.

In *Johnson*, which was a consolidation of three actions, "the plaintiffs . . passed up the opportunity to frame their dilution claim in statewide terms." *Johnson*, ____ U.S. at ____, 114 S.Ct. at 2662. The complaints filed by two sets of plaintiffs "pointed to areas around the state" of Florida where the alleged violations occurred. *Id.* at ____, 114 S.Ct. at 2652. The Department of Justice (DOJ) filed a third action that "alleged that [the apportionment plan] diluted the voting strength of blacks and Hispanics in two parts of the State in violation of § 2."[13] *Id.* "[N]either the evidence at trial nor the opinion of the District Court addressed white bloc voting and political cohesion of minorities statewide." *Id.* at ____, 114 S.Ct. at 2662. In spite of the fact that the complaints and evidence focused solely upon two counties, the United States sought to expand the geographic scope beyond these counties to include the entire State of Florida. *Id. Johnson* rejected this attempt, confining the geographical scope of its proportionality analysis to the two counties originally challenged in the complaints and subjected to proof at the five-day bench trial. *Id. Johnson* concluded its discussion of this issue by noting that the parties "apparently agreed

[13] The dilution of the votes of the Hispanic population was alleged by the DOJ to have occurred in an area largely covered by Dade County. The dilution of the black vote was alleged to have occurred in and around Escambia County. The appeal to the Supreme Court involved only the claims concerning the Dade County area. *Johnson*, ____ U.S. at ____, 114 S.Ct. at 2652.

in the District Court on the appropriate geographical scope for analyzing the alleged § 2 violation and devising its remedy." *Id.*

We believe that the Bosley plaintiffs have fixed upon a citywide geographical scope for analyzing the alleged § 2 violation just as the parties agreed on a two-county-wide scope in *Johnson*. The Bosley plaintiffs' complaint focuses upon a citywide distribution of voting strength. It alleges a § 2 violation due to the 1991 redistricting plan's failure to provide at least fourteen black majority wards out of a citywide twenty-eight. Compl. ¶¶ 45 & 49. Moreover, the complaint refers to the aldermanic wards in a generic fashion that includes all twenty-eight; it does not limit the described wards to the five central corridors. Nowhere in the complaint is any allegation made concerning corridor-specific voting practices; all such allegations are made on a citywide basis. The Bosley plaintiffs' complaint obviously focuses upon the entire city of St. Louis and they have "passed up the opportunity to frame their dilution claim" in more restrictive terms.

In addition, the only proof submitted by the Bosley plaintiffs, the Jones affidavit, discusses citywide voting patterns. Jones states that:

> [t]he plan for reapportionment of the twenty-eight wards for election of members to the Board of Aldermen of St. Louis City, Missouri, enacted in December, 1991, diluted the voting strength of black residents in St. Louis City by packing part of the black population into twelve wards . . . w[h]ere they constitute an overwhelming black majority in eleven of said wards in excess of 75% and then by cracking the remaining black population among [seven] wards . . . in which they constituted a voting age minority of the population. . . .

App. at 86. Jones also states her conclusions as "[t]he 1991 plan for reapportionment of the twenty-eight wards for election of members of the St. Louis City Board of Aldermen and political party committee members has a discriminatory effect," and that "[i]f the present geographical ward boundaries for electing aldermen and political party committee members, were reapportioned fairly and without discriminatory effect, blacks would constitute effective voting majorities in fourteen out of the twenty-eight wards of said city."[14] App. at 87. Accordingly, we conclude that the Bosley plaintiffs' pleadings and proof before the district court focused upon a citywide area, not merely the five central corridors. We are not persuaded by the plaintiffs' belated attempts to recharacterize their claims on appeal. Thus, because *Johnson* defined geographical scope by the scope that was pleaded and the subject of proof, and the Bosley plaintiffs' pleadings and proof concerned the entire city of St. Louis, we hold that the district court's use of the entire city of St. Louis was con-

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[14] The Bosley plaintiffs and Jones repeatedly invoked terms such as "packing" and "fragmenting," as if mere repetition of these terms establishes a § 2 violation. *Johnson* counsels otherwise:

> Attaching the labels "packing" and "fragmenting" to these phenomena [*i.e.*, that district lines separate portions of Hispanic neighborhoods while another district line draws several Hispanic neighborhoods into a single district], without more, does not make the result vote dilution when the minority group enjoys substantial proportionality. ____ U.S. at ____, 114 S.Ct. at 2659. The "something more" alluded to by the Court in *Johnson* requires that application of these terms must be supported by statistical (or other appropriate) evidence, and we have found no such evidence here. Thus, the references to packing and fragmenting "say only that lines could have been drawn elsewhere, nothing more. . . . [S]ome dividing by district lines and combining within them is virtually inevitable and befalls any population group of substantial size." *Id.*

sistent with *Johnson* and was proper.[15] Accordingly, we hold that the district court correctly determined that proportionality exists under the 1971-1991 plans.

2. Did the district court improperly apply proportionality as an absolute bar to a § 2 dilution claim?

The *Gingles* factors are not exhaustive. They are necessary, but not sufficient, to establish a § 2 voting dilution violation. *Johnson*, ____ U.S. at ____, 114 S.Ct. at 2657. In *Johnson*, the Supreme Court considered the existence of proportionality to be sufficient to provide minority voters an equal opportunity to participate in the political process. *Id.* at ____, 114 S.Ct. at 2651. However, proportionality is only one factor in the totality of circumstances. It is not a "safe harbor" that automatically defeats a claim of vote dilution:

> While . . . proportionality is not dispositive in a challenge to single-member districting, it is a relevant fact in the totality of circumstances to be analyzed when determining whether members of a minority group have 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'

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[15] We are aware that *Johnson* was decided after a trial and involved an attempt by the United States to modify the geographical scope on appeal. However, to the extent that this case differs from *Johnson* because it is resolved on summary judgment and/or because the Bosley plaintiffs attempted to change the scope in the district court, *Johnson* expressly declines to impose any requirement concerning the appropriate geographical scope. *Johnson*, ____ U.S. at ____, 114 S.Ct. at 2662. Assuming arguendo that *Johnson* differs from this case in some significant respect (and we believe that it does not), *Johnson* reserved the issue of the appropriate geographical scope, and we find the analysis applied in *Johnson* to be equally applicable here.

Id. (citation omitted); *see id.* at ____, 114 S.Ct. at 2659. The ultimate question is whether the result of manipulation of district lines "interacting with social and historical conditions impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Id.* at ____, 114 S.Ct. at 2655 (internal citation, quotation and modification omitted).

In its June 17, 1992 order, the district court stated that "[d]efendants contend that as a matter of law Plaintiffs cannot establish their Voting Rights Act claim because evidence of persistent proportional representation establishes that there is no violation of Section 2." Order at 7. The district court then quoted a passage from *Gingles* that stated that "persistent proportional representation is inconsistent" with a § 2 violation. The district court cited *Harvell v. Ladd*, 759 F.Supp. 525 (E.D.Ark. 1991), *rev'd on other grounds*, 958 F.2d 226 (8th Cir. 1992) (subsequent history omitted), as a case in which sustained electoral success was "the overriding factor." We believe that these quotations and citations indicate a view of the role of the proportionality factor that is consistent with *Johnson*.

Although, under a strained reading, the district court opinion could be construed as applying a per se rule that proportionality bars a § 2 voting dilution claim, we do not believe that this interpretation is correct.[16] Rather, we

[16] The district court opinion in *Harvell*, although reversed on appeal because it failed to make findings concerning whether the sustained electoral success of black candidates was due to "special circumstances," 958 F.2d at 230, listed several factors cited in *Gingles* and carefully considered the totality of circumstances before concluding that sustained electoral success was an overriding factor inconsistent with a § 2 violation. 759 F.Supp. at

(Footnote continued on following page)

believe the district court properly considered the proportionality factor as one of several factors. Although the district court's opinion focuses heavily upon proportionality, it addresses the various other factors and points raised by the Jones affidavit. *See, e.g.*, App. at 133-34 (discussing Jones' challenge to Davison's methodology, to the Umsheid affidavit, and to the practice of block splitting).[17]

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[16] *continued*

528-29. The district court *Harvell* opinion is diametrically opposed to the use of proportionality as a per se rule, and is wholly consistent with *Johnson*.

The district court also cited *Collins v. City of Norfolk*, 679 F.Supp. 557, 563 (E.D.Va. 1988), *rev'd on other grounds*, 883 F.2d 1232 (4th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S.Ct. 340, 112 L.Ed.2d 305 (1990). Although the district court's choice of language was unfortunate, the district court neither adopted nor expressly relied upon the paraphrased portion of *Collins*. Rather, the district court merely reported the *Collins* dictum. Moreover, despite the ill-advised dicta, the *Collins* court did not apply proportionality as a per se bar to a § 2 claim. The *Collins* opinion considered numerous circumstances and stressed the totality of circumstances. 679 F.Supp. at 586-87. For these reasons, we do not believe that the district court's citation of *Collins* reveals an improper view of the role of proportionality.

[17] The Bosley plaintiffs complain that the district court failed to make sufficiently detailed findings of fact, citing *Harvell v. Ladd*, 958 F.2d 226 (8th Cir. 1992). However, the lesson of *Harvell* is not that the trial court must exhaustively catalogue the minutiae of a Voting Rights Act case and deal with factors that are not placed in issue; rather, it is simply that:

> In order to review a district court's findings of fact and conclusions of law, a court of appeals must have before it sufficient detail to enable it to determine the factual and legal bases for the district court's judgment.

958 F.2d at 229. We believe that the district court adequately performed its duty to make its reasoning apparent in this case. While we admonish district courts to take care and include all circumstances that go into the "totality" when these circumstances are placed in issue, we cannot say that the district court failed to do

(Footnote continued on following page)

However, we need not resolve this issue of interpretation, for assuming that the district court focused its opinion too heavily upon proportionality, we "review judgments, not opinions, and we may affirm a judgment on any ground supported by the record, whether or not that ground was urged below or passed on by the district court." *United States v. Sager*, 743 F.2d 1261, 1263 n. 4 (8th Cir. 1984), *cert. denied*, 469 U.S. 1217, 105 S.Ct. 1196, 84 L.Ed.2d 341 (1985); *accord United States v. Dugan*, 912 F.2d 942, 944 (8th Cir. 1990); *Johnson*, ____ U.S. at ____ n. 5, 114 S.Ct. at 2653 n. 5 (discussing review of district court judgment by Supreme Court). We believe that a proper consideration of the proportionality factor as it relates to the totality of circumstances in this case leads inexorably to the conclusion that the complaints contained in the Jones affidavit fail to create a genuine issue of material fact as to whether a § 2 violation has occurred. Jones objected to the drawing of ward boundaries so that census blocks were split among two wards. However, there is no requirement that federal decennial census blocks be used as boundaries during reapportionment. *See Burns v. Richardson*, 384 U.S. 73, 91, 86 S.Ct. 1286, 1296, 16 L.Ed.2d 376 (1966). Jones states that black voting power was not max-

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[17] *continued*

so here. The heavy focus upon proportionality is neither inconsistent with *Johnson* nor surprising, as the record before the district court also dealt almost entirely with the proportionality issue. The record before the district court consisted of the Davison and Jones affidavits and supporting exhibits. The Davison affidavit discusses proportionality extensively and virtually exclusively. In addition to her objections already discussed, Jones objected to the Umsheid affidavit, claiming that Umsheid used a flawed methodology and improperly adjusted census figures. App. at 91-92. However, as the district court noted, Jones based thisd analysis upon extensive references to deposition testimony not provided to the district court. App. at 91-92.

imized. App. at 88, 89. However, black voting power need not be maximized. *Johnson*, ____ U.S. at ____, 114 S.Ct. at 2656. The Jones affidavit recited the *Gingles* factors and the *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), factor of the continuing effects of past discrimination. App. at 85-86. However, the proportionality factor was given extremely heavy weight in *Johnson* despite evidence of continuing discrimination and satisfaction of the *Gingles* and *White* factors. *See Johnson*, ____ U.S. at ____, 114 S.Ct. at 2663. None of the contents of the Jones affidavit create any dispute that would distinguish this case from *Johnson*.

It is significant that none of the scenarios that led the *Johnson* Court to reject a per se rule are present in this case. *See id.* at ____-____, 114 S.Ct. at 2660-61. The only allegation of differential treatment of whites and blacks is Jones' statement that safe black wards contained smaller populations than other wards. To the extent that this is true, it is an enhancement rather than a dilution of the black vote. Moreover, contrary to the assertions of the plaintiffs, the twenty-eight wards were drawn remarkably evenhandedly. They had an average deviation of 2.8% and a range of 8.3%, neither of which is significant. *See Brown v. Thomson*, 462 U.S. 835, 842, 103 S.Ct. 2690, 2696, 77 L.Ed.2d 214 (1983) (reapportionment plans with deviations of less than 10% require no justification in Fourteenth Amendment context). We believe that this case is virtually indistinguishable from *Johnson*, and that a proper consideration of the proportionality factor would yield the same result as that reached by the district court. Accordingly, we hold that the district court did not act in a manner inconsistent with *Johnson* when it awarded

summary judgment to the defendants on the basis of the record before it.[18]

III. CONCLUSION

We hold that the district court did not abuse its discretion when it rejected the Bosley plaintiffs' untimely filed materials. We also hold that the district court properly granted summary judgment where the record before it demonstrated that sustained and substantial proportionality existed between the percentage of blacks in the city-wide voting age population and the number of safe black wards. Accordingly, the judgment of the district court is affirmed.

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[18] The foregoing analysis has addressed the Bosley plaintiffs' § 2 "effects" claim. We reject the Bosley plaintiffs' argument that a § 2 "intent" claim does not require proof of a discriminatory effect. *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991), relied upon the text of the Voting Rights Act to find that a discriminatory effect was required in an intent case. Although *Garza* was a pre-*Johnson* case, there is nothing in the most recent pronouncements of the Supreme Court to cast any doubt upon its continued validity. The remarks contained in *Johnson* are intended merely to rebut the use of proportionality as a safe harbor. In fact, *Voinovich* is a ringing endorsement of the requirement of a discriminatory effect:

> [Section] 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect the candidate of its choice does it violate § 2; where such an effect has not been demonstated, § 2 simply does not speak to the matter.

___ U.S. at ___, 113 S.Ct. at 1156. (emphasis in original). In light of statements such as these, it is hardly any wonder that the Seventh Circuit noted that it is "no longer clear that intent plays any role in a suit under section 2." *Barnett v. Daley*, 32 F.3d 1196, 1202 (7th Cir. 1994). We agree with the *Garza* court; to the extent that intent plays any role in a § 2 suit, it does so only in conjunction with a discriminatory effect. Accordingly, where there is no discriminatory effect, there is no intent violation. Thus, we affirm summary judgment on the § 2 intent claim as well.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3826EMSL

Freeman Bosley, Jr., et al,

Appellants,

v.

Thomas A. Villa, et al,

Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Chief Judge Richard S. Arnold, Judge McMillian, and Judge Murphy would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

August 9, 1995

Order Entered at the Direction of the Court:
/s/ Michael E. Gens
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

SUPREME COURT REPORTER

Sharon TYUS, et al., petitioners, v. Freeman BOSLEY, Jr., et al.,

No. 93-1394.

June 30, 1994.

Case below, *African American Voting Rights v. Villa*, 999 F.2d 1301.

APPENDIX D

AFRICAN AMERICAN VOTING RIGHTS LEGAL DEFENSE FUND, INC.; Charles Q. Troupe; Angela D. Walton, Plaintiffs,

Freeman Bosley, Jr.; Bertha Mitchell, Appellants,

Ida Ford; Charles Parker; Albert Banks; Carol Page; Luretta Hawkins; Elmer Otey; Jacqueline McGill, Plaintiffs,

Sharon Tyus, Appellant,

Laura Gordon; Alexis Johnson, Plaintiffs,

Irving Clay; Claude Taylor, Appellants,

v.

Thomas A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; Vincent C. Schoemehl, in his capacity as Mayor, City of St. Louis, Missouri; Board of Aldermen, City of St. Louis, Missouri; City of St. Louis, Appellees.

American Civil Liberties Union, Amicus Curiae.

No. 92-3826.

United States Court of Appeals, Eighth Circuit.

Submitted May 12, 1993.

Decided Aug. 4, 1993.

Order Denying Rehearing and Rehearing En Banc Nov. 1, 1993.

Appeal from the United States District Court for the Eastern District of Missouri; Hon. Jean C. Hamilton, District Judge.

Judson Miner, Chicago, IL, argued for appellants.

Donna A. Smith, St. Louis, MO, on brief for amicus curiae American Civ. Liberties Union.

Julian Bush, St. Louis, MO, argued (James J. Wilson, Edward J. Hanlon and Michael Garvin, on brief), for appellees.

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGILL, Circuit Judge.

Plaintiffs-appellants appeal from the district court's[1] order granting summary judgment to defendants-appellees, the Mayor of the City of St. Louis (the City), the President of the Board of Aldermen, and the Board of Aldermen. Appellants brought this action claiming the City's redistricting ordinance which established ward boundary lines for selecting aldermen and for selecting political party committees violated § 2 of the Voting Rights Act and the First, Thirteenth, Fourteenth, and Fifteenth Amendments. We affirm.[2]

Appellants claim the district court erred by: (1) applying the affirmative defense of sustained proportional representation to the § 2 claim; (2) measuring proportional representation by comparing the minority group's percentage of the voting age population to the minority group's percentage of elected representatives; (3) finding the City's African-American community controls twelve wards and is thus proportionally represented; (4) finding the City's African-American community has had a sustained history of electoral success evidenced by proportional representation throughout the 1970s and 1980s; and (5) holding there are no special circumstances showing the African-American

[1] The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri.

[2] The motion of appellants for supplemental briefing is denied as moot.

community's sustained electoral success does not accurately reflect the community's ability to elect its preferred representatives.

We find no error of law or clearly erroneous findings of fact in the district court's well-reasoned memorandum, and an opinion would have no precedential value. We affirm the judgment of the district court. *See* 8th Cir.R. 47B.

Before: RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

ORDER

Nov. 1, 1983.

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion.

The petition for rehearing by the panel is also denied.

McMILLIAN, Circuit Judge, dissenting.

I respectfully dissent from this court's denial of the suggestion for rehearing en banc.

Plaintiffs challenge the City of St. Louis' 1990 redistricting map for aldermanic wards as violative of § 2 of the Voting Rights Act and the Constitution. The district court granted defendants' motion for summary judgment and this court summarily affirmed. This case raises important legal and factual issues under the Voting Rights Act. In my view, genuine issues of material fact exist making this case wholly unsuited for summary judgment. The district

court gave no consideration to, and made no findings concerning, serious allegations and evidence of a violation of § 2 of the Voting Rights Act. In particular, I believe the district court should have made detailed findings regarding whether the City of St. Louis intentionally created its aldermanic districts to dilute black voting strength in violation of Section 2. "Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process." *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986). The district court and the panel deprived plaintiffs of such an opportunity.

APPENDIX E

[Filed June 17, 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

AFRICAN AMERICAN VOTING RIGHTS LEGAL DEFENSE FUND, INC., et al.,	)	
Plaintiffs,	)	Cause No.
vs.	)	4:92CV00044 JCH
THOMAS A. VILLA, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Defendants' motion for summary judgment.

Plaintiffs filed this action seeking a declaratory judgment and injunctive relief. Plaintiffs allege the City's ward boundary lines for selecting aldermen and for selecting political party committees violate the First Amendment, the Thirteenth Amendment, the Fourteenth Amendment, the Fifteenth Amendment and the Voting Rights Act.

Defendants contend that the populations of the city wards are sufficiently equal to meet requirements of the

Fourteenth Amendment and that the boundary lines under the redistricting plan do not violate the Voting Rights Act because the current plan and all plans since 1971 have provided proportional representation. Defendants further contend that the Voting Rights Act is unconstitutional and that Plaintiffs' Thirteenth Amendment claim should be dismissed.

This Court may grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The substantive law determines which facts are critical and which are irrelevant. Only disputes over facts that might affect the outcome will properly preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

A moving party always bears the burden of informing the Court of the basis of its motion. *Celotex Corp.*, 477 U.S. at 323. Once the moving party discharges this burden, the nonmoving party must set forth specific facts demonstrating that there is a dispute as to a genuine issue of material fact, not the "mere existence of some alleged factual dispute." Fed. R. Civ. P. 56(c); *Anderson*, 477 U.S. at 247. The nonmoving party may not rest upon mere allegations or denials of his pleading. *Id.* at 256.

In passing on a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party, and all justifiable inferences are to

be drawn in his favor. *Id.* at 255. The Court's function is not to weigh the evidence but to determine whether there is a genuine issue for trial. *Id.* at 249.

CONSTITUTIONAL CLAIMS

Reapportionment is a legislative function. *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). The Supreme Court has recognized that the legislature is "best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." *Connor v. Finch*, 431 U.S. 407, 415-16 (1977).

In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court recognized that every qualified resident has the constitutional right to a vote substantially equal in weight to the vote of every other resident in an election for state legislators. *Reynolds v. Sims*, 377 U.S. at 568. The concept of "one-person-one-vote" also applies to units of local government within a state. *Avery v. Midland County*, 390 U.S. at 474, 484-85 (1968). Particular circumstances and needs of a local community as a whole may at times justify departures from strict equality. *Abate v. Mundt*, 403 U.S. 182, 185 (1971). Less fundamental concerns, however, must be subordinated to the constitutional requirement of "one-person-one-vote." *Kirksey v. Board of Supervisors*, 554 F.2d 139, 151 (5th Cir. 1977), *cert. denied*, *Board of Supervisors v. Kirksey*, 434 U.S. 968 (1977).

Population is the starting point for consideration and the controlling criterion for judgment in apportionment decisions. *Reynolds v. Sims*, 377 U.S. at 567. Population alone is the sole criterion of constitutionality in congressional reapportionment. *Mahan v. Howell*, 410 U.S. 315, 322 (1973). A legislative body reapportioning state legis-

lative districts, however, has broader latitude. *Id.* A state legislative reapportionment plan having a maximum population deviation ranging up to ten percent falls within the category of minor deviations requiring no legislative justification. *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

Defendants submitted the affidavit of Donald L. Davison (hereinafter Davison) in support of their contention that the populations of the wards are sufficiently equal to meet the requirements of the Fourteenth Amendment. Davison relied on data compiled by the Bureau of Census to conduct his analysis. (Davison Affidavit ¶ 3) Of the twenty-eight wards, the boundaries of twenty-four are coterminous with census blocks. In two cases where a boundary cut across a single census block, Davison relied upon his own personal inspection and upon the affidavit of Stephen Umscheid (hereinafter Umscheid) of the Community Development Agency. (Davison Affidavit ¶3) The total population is 396,685. The ideal ward population is 14,168, the total population divided by the number of wards. Deviation from the ideal is determined by subtracting the ideal from the actual ward population. The percentage deviation for each ward is determined by dividing the deviation by the ideal. The overall range or maximum deviation is the sum of the deviation of two wards which establish the upper and lower deviations for all wards. (Davison Affidavit Ex. B) The average percent deviation for all twenty-eight wards in St. Louis under the 1991 redistricting plan is 2.83% and the overall range or maximum deviation is 8.3%. (Davison Ex. B, Table 2)

Plaintiffs did not file a memorandum in opposition to the summary judgment. They did file the affidavit of their expert Charlene L. Jones (hereinafter Jones). Jones' affidavit does not refute the figures in the Davison affidavit. Jones merely challenges the method used in arriving at

the figures and states that because four wards did not contain whole census blocks that compliance by the plan with the Fourteenth Amendment is "incapable of being ascertained." Jones, who states in her affidavit that she reviewed the affidavit and deposition of Stephen Umscheid, also asserts that Umscheid testified he "adjusted census data" based on aerial photographs. No such statement concerning adjusted data is included in the Umscheid affidavit contained in the record before the Court. That affidavit does explain the method used for apportioning population when a ward line split census blocks. Moreover, no deposition of Stephen Umscheid is contained in the record before this Court.

There is no requirement that the federal decennial census blocks be used in reapportionment. *Burns v. Richardson*, 384 U.S. 73, 91 (1966). Plaintiffs have not contended that the method used to apportion population to wards where census blocks were split is unreasonable or erroneous or that errors would cause the maximum deviation to be greater than 10%. Plaintiffs therefore have not raised an issue for trial. The maximum deviation of 8.3% is well within the 10% allowed under the law. Defendants shall have summary judgment on Plaintiffs' Fourteenth Amendment claim.

Plaintiffs also contend the plan violates the Thirteenth Amendment. Plaintiffs have pleaded no facts to support such a contention and Plaintiffs' opposition affidavit fails to address the issue. Defendants shall have summary judgment on Plaintiffs' Thirteenth Amendment claim. Furthermore, Plaintiffs fail to state a claim for relief under the First Amendment, the Thirteenth Amendment, and the Fourteenth Amendment. They have pleaded no statutory provision allowing a civil action to redress constitutional violations.

VOTING RIGHTS ACT CLAIM

The Voting Rights Act as amended in 1982 provides in pertinent part:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

42 U.S.C.A. §1973(a) (1991 Supp.). A violation of the Voting Rights Act is established by showing that the "political processes leading to nomination or election . . . are not equally open to participation" by the protected class in that "its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C.A. §1973(b) (1991 Supp.). The Voting Rights Act specifically provides that the act does not establish "a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C.A. §1973(b) (1991 Supp.). Evidence of discriminatory intent is no longer necessary to prove a violation; discriminatory results are sufficient proof. *Ketchum v. Byrne*, 740 F.2d 1398, 1403 (7th Cir. 1984), *cert. denied, City Council of Chicago v. Ketchum*, 471 U.S. 1135 (1985).

A number of courts have concluded that more than a simple majority is required for historically disadvantaged minorities to have a practical opportunity to elect candidates of their choice. *E.g., Ketchum v. Byrne*, 740 F.2d at 1413; *Kirksey v. Board of Supervisors*, 554 F.2d at 149-50; *Smith v. Clinton*, 687 F.Supp. 1361, 1362-63 (E.D. Ark. 1988), *aff'd, Clinton v. Smith*, 488 U.S. 988 (1988); *Dillard v. Crenshaw County*, 649 F.Supp. 289, 298 (M.D. Ala.

1986), *remanded on other grounds*, 831 F.2d 246 (11th Cir. 1987). Courts have frequently used sixty-five percent as a guideline for the proportion of minority population reasonably required to ensure minorities a fair opportunity to elect a candidate of their choice. The sixty-five percent figure is derived by augmenting parity[1] five percent for the relative youth of the minority population, five percent for its low voter registration, and five percent for its low voter turnout.[2] *Ketchum v. Byrne*, 740 F.2d at 1415. The sixty-five percent population figure is a mere guideline.

Defendants contend that as a matter of law Plaintiffs cannot establish their Voting Rights Act claim because evidence of persistent proportional representation establishes that there is no violation of Section 2. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court noted that "persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority." *Thornburg v. Gingles*, 478 U.S. 30, 77 (1986) (multimember district case). In *Harvell v. Ladd*, 759 F.Supp. 525 (E.D.Ark. 1991), sustained electoral success by black candidates led the court to conclude that black voters did not have less opportunity to elect representatives of their choice. *Harvell v. Ladd*, 759 F.Supp. 525, 529 (E.D. Ark.

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[1] The court in *Ketchum v. Byrne* said that the 65% guideline was derived by augmenting a simple majority.

[2] The 65% figure is used by the Justice Department as a threshold population figure for finding impermissible retrogression of minority voting strength in redistricting matters reviewed under Section 5 of the Voting Rights Act. *James v. City of Sarasota*, 611 F.Supp. 25, 32 (M.D. Fla. 1985).

1991) The decision referred to sustained electoral success as the overriding factor. *Id.* In *Collins v. City of Norfolk*, 679 F.Supp. 557 (E.D. Va. 1988), *rev'd on other grounds*, 883 F.2d 1232 (4th Cir. 1989), the court concluded that the plurality in *Gingles* established that proportional representation bars a Section 2 claim. *Collins v. City of Norfolk*, 679 F.Supp. 557, 563 (E.D. Va. 1988), *rev'd on other grounds*, 883 F.2d 1232 (4th Cir. 1989).

Based upon the 1990 census data there are twelve wards in which black voters should be able to elect representatives of their choice. (Davison affidavit ¶ 4) The twelve "safe" wards represent 42.86% of the twenty-eight wards in the city. The size of the black voting age population in the city is 42.67%. (Davison affidavit ¶4; Davison Affidavit Ex. C) Under the 1981 plan the black voting age population was 40.2% and the black representation was 39.29%. (Davison affidavit ¶5; Davison affidavit Ex. D) Under the 1971 plan the black voting age population was 34.95% and the black representation was 35.71%. (Davison affidavit ¶6 [p.6]; Davison affidavit Ex. E)

Plaintiffs do not refute that the black aldermen serving from the 1970s to present were and are representatives of the minority community's choice. They do not suggest special circumstances that would demonstrate that the apparent sustained success does not accurately reflect the minority's ability to elect its preferred representatives. Instead, Plaintiffs submit a largely conclusory affidavit containing one legal argument that the use of voting population instead of total population in determining proportionate representation is constitutionally defective based on the holding in *Preisler v. Mayor of City of St. Louis*, 303 F.Supp. 1071 (E.D. Mo. 1969). However, *Preisler* involved an analysis under the Fourteenth Amendment and

addressed what measure of population is appropriate for determining population under the requirements of the Fourteenth Amendment. Voting age is an appropriate measure for Voting Rights Act cases. *See, e.g., McNeil v. Springfield Park Dist.*, 851 F.2d 937, 945 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

Defendants have demonstrated and Plaintiffs have failed to refute that sustained electoral success by black candidates defeats Plaintiffs' claim that black voters have less opportunity to elect representatives of their choice. Defendants shall have summary judgment on Plaintiffs' claim pursuant to the Voting Rights Act. The constitutional issues raised in Defendants' memorandum need not be addressed.

ACCORDINGLY,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment is GRANTED.

Dated this 17th day of June, 1992.

/s/ JEAN C. HAMILTON
United States District Judge

APPENDIX F

[Filed November 2, 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

AFRICAN AMERICAN VOTING RIGHTS LEGAL DEFENSE FUND, INC., et al.,	)	
Plaintiffs,	)	Cause No.
vs.	)	4:92CV00044 JCH
THOMAS A. VILLA, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiffs' Motion to Alter or Amend this Court's June 17, 1992 Judgment pursuant to Federal Rule of Civil Procedure 59(e).

Plaintiffs filed this action seeking declaratory and injunctive relief on January 13, 1992. Plaintiffs alleged that the ward boundary lines of the City of St. Louis which are used for the selection of alderman and political party committees violate the First Amendment, the Thirteenth Amendment, the Fifteenth Amendment, and the Voting Rights Act. This Court granted summary judgment for

Defendants on June 17, 1992. The Court reasoned *inter alia*, that Defendants demonstrated and Plaintiffs failed to refute that the "sustained electoral success by black candidates defeats Plaintiffs' claim that black voters have less opportunity to elect representatives of their choice."

Plaintiffs move the Court to reconsider its judgment granting summary judgment to Defendants, asserting that the Court "was misled by Defendants' inaccurate and incomplete presentation." Defendants oppose the motion, contending that "[a]ll of what is argued in the motion is or could have been argued before judgment was entered." Plaintiff's Rule 59(e) motion was filed within the ten day time limit.

Under Federal Rule of Civil Procedure 59(e), a district court has broad discretion in determining whether to reconsider a decision. *Roudybush v. Zabel*, 813 F.2d 173, 178 (8th Cir. 1987); *Harris v. Arkansas Dep't of Human Services*, 771 F.2d 414, 416-17 (8th Cir. 1985); *Pitts v. Electro-Static Finishing, Inc.*, 607 F.2d 799, 803 (8th Cir. 1979). Rule 59(e) was adopted to make clear that a district court possessed the power to rectify its own mistakes in the period immediately following the entry of judgment. *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450 (1982). A Court may use Rule 59(e) to set aside a judgment in its entirety. *Sanders v. Clemco Indus.*, 862 F.2d 161, 168, n.13 (8th Cir. 1988).

Under Rule 59(e), the court may reconsider matters properly encompassed in a decision on the merits. *White*, 455 U.S. at 451. A Rule 59(e) motion may not encompass new issues. *Ray E. Friedman & Co. v. Jenkins*, 824 F.2d 657, 660 (8th Cir. 1987) (Rule 59(e) could not be used to assert a counterclaim).

A motion to alter or amend under Rule 59(e) must rely on one of three major grounds: (1) an intervening change in controlling law; (2) the availability of new evidence not available previously; or (3) the need to correct a clear error of law or prevent manifest injustice. *Bannister v. Armontrout*, No. 87-0637-CV-W-9, 1992 U.S. Dist. LEXIS 7335, at *2 (W.D. Mo. Apr. 30, 1992) (citations omitted).

Here, Plaintiffs appear to rely on the third ground to support their motion to alter or amend. Plaintiffs assert that the Court's judgment was based on the Defendants' incorrect argument that "there can be no voting rights violation if a ward map provides a minority community with the possibility of achieving proportional representation based on the minority's percentage of the voting-age population." The issue before the Court is whether Plaintiffs have shown a clear error of law in the order granting summary judgment for Defendants.

Plaintiffs challenge to the Court's findings concerning the electoral success of the African-American community. The challenge, however, is dependent on additional facts which Plaintiffs failed to produce in response to Defendants' summary judgment motion. Plaintiffs have shown no clear error of law on the record before the Court when the Court entered its order of June 17, 1992. By their own admission, Plaintiffs failed to fully respond to Defendants' summary judgment motion, they filed only an affidavit by their expert. Plaintiffs now attempt to amend the record. Because Plaintiffs have shown no reason why the facts and issues now presented could not have been produced at an earlier time, it is inappropriate to reconsider the judgment based on an amended factual record.

Plaintiffs also contend that the Court was in error in using voting-age population, rather than total population,

to measure proportional representation. Voting-age population is the pertinent population for Voting Rights Act purposes. *Harvell v. Ladd*, 958 F.2d 226, 227-28 (8th Cir. 1992).

After carefully reviewing the briefs filed by the parties, the Court concludes that Plaintiffs are not entitled to relief from summary judgment under Rule 59(e). Plaintiffs' Motion to Alter or Amend this Court's June 17, 1992 Judgment pursuant to Federal Rule of Civil Procedure 59(e) will be denied because none of the three grounds for the motion have been established. First, there has been no intervening change in controlling law. Second, Plaintiffs have not established the availability of any new evidence which was not available previously. Third, there was no clear error of law or manifest injustice in granting Defendants motion for summary judgment.

ACCORDINGLY,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Alter or Amend this Court's June 17, 1992 Judgment is DENIED.

Dated this 2nd day of November, 1992

/s/ JEAN C. HAMILTON
United States District Judge

APPENDIX G

SUBCHAPTER I-A—ENFORCEMENT OF VOTING RIGHTS

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites: establishment of violation

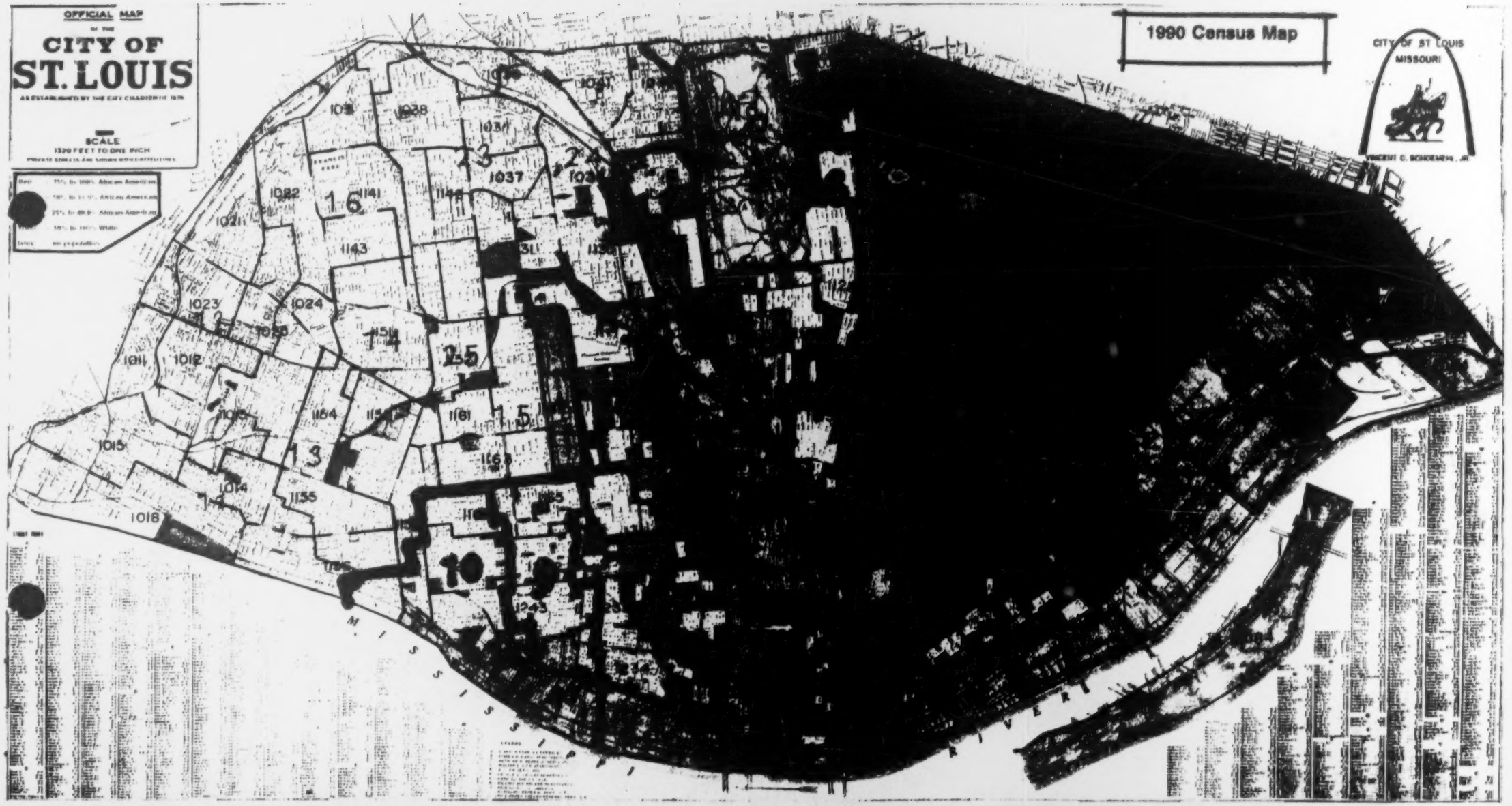
(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(As amended Pub. L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

APPENDIX H

Red = 75-100% African-American
Orange = 50-74.9% African-American
Pink = 25-49.9% African-American
Gray = 0% population
White = 75-100% white



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JAN 18 1996
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No. 95-852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SHARON TYUS; FREEMAN BOSLEY, SR.; BERTHA MITCHELL; IRVING CLAY JR.; and CLAUDE TAYLOR,

Petitioners,

v.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; FRANCIS SLAY, in his capacity of President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and THE CITY OF ST. LOUIS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI OF RESPONDENTS FRANCIS SLAY, BOARD OF ALDERMEN, AND THE CITY OF ST. LOUIS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	5
I. The Petition Should Be Denied Because Petitioners, Who Are Not Residents Of The Wards Where They Claim That There Is Vote Dilution, Do Not Have Standing To Present That Claim	5
II. The Petition Should Be Denied Because The Eighth Circuit Decision Is Wholly Consistent With *Johnson v. DeGrandy* And Other Precedent	6
III. The Petition Should Be Denied Because The Claimed Split Among Lower Courts As To Whether To Use Voting Age Population Or Total Population In Assessing Proportionality Does Not Justify Granting A Writ Of Certiorari	8
IV. The Petition Should Be Denied Because The Facts Of This Case Do Not Give Rise To A Results Claim When Different Boundary Drawing Practices Were Used In The Black And White Communities	9
CONCLUSION	10

TABLE OF AUTHORITIES

Page(s)

Cases:

African American Voting Rights Legal Defense Fund Inc. v.*Villa*, 999 F.2d 1301 (8th Cir. 1993) (Table) (per curiam) 3

African American Voting Rights Legal Defense Fund Inc. v.*Villa*, 54F.3d 1345 (8th Cir. 1995) ..... passim

Barnett v. Daley, 32 F.3d 1196, 1202 (7th Cir. 1994) .. 7,8

Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) 7

Johnson v. DeGrandy, 114 S.Ct. 2647 (1994) ..... passim

Miller v. Johnson, 115 S.Ct. 2475 (1995) 4,5

Shaw v. Reno, 509 U.S —, 113 S.Ct. 2816 (1993) 4,5

Tyus v. Bosley, 114 S.Ct. 2776 (1994) 3

United States v. Hays, — U.S. —, 115 S.Ct. 687, 132 L.Ed. 2d 635, (1995) 6

Voinovich v. Quiller, 507 U.S. —, 113 S.Ct. 1149 (1993) 7

Statutes and Rules:

42 U.S.C. § 1973 ..... passim

Supreme Court Rule 10 1

Supreme Court Rule 35.3 1

Federal Rule of Appellate Procedure 43(c)(1) 1

No. 95-852

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI OF RESPONDENTS FRANCIS SLAY, BOARD OF ALDERMEN, AND THE CITY OF ST. LOUIS

Respondents Francis Slay,[1] Board of Aldermen of the City of St. Louis, and the City of St. Louis respectfully request that this

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(1) and Supreme Court Rule 35.3, Respondent Francis Slay, as Thomas Villa's successor to the public office of President of the Board of Aldermen, is automatically substituted as a party herein.

Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That decision is reported at 54 F.3d 1345.

STATEMENT OF THE CASE

Plaintiffs initiated this suit in January 1992, alleging the City of St. Louis' ward boundary lines, which define twenty-eight single-member aldermanic wards,[2] as re-drawn after the 1990 census, violate the First, Thirteenth, Fourteenth, and Fifteenth Amendments of the United States Constitution and § 2 of the Voting Rights Act, 42 U.S.C. § 1973. (1-18.)[3] The district court granted summary judgment in favor of Defendants on all claims. (App. E.) The undisputed evidence before the district court in part showed that the total population of the City of St. Louis is 50.9% white and 47.5% black, and that the voting age population is 55.8% white and 42.7% black. (43.) Further, there had been rough proportional representation of blacks on the Board of Aldermen since 1971, and the 1991 plan provided for proportionality of the voting age population by defining twelve safe black wards out of twenty-eight, or 42.86 % of the wards. (32-35; App. E-8.) Plaintiffs suggested no special circumstances to demonstrate that sustained electoral success does not accurately reflect the minority's ablilty to elect its preferred representatives. (App. E-8.) Further, boundaries of twenty-four of the wards are co-terminous with census blocks, and the average

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[2] In addition to these single-member wards, St. Louis has three city-wide elected officials, including the Mayor, who is black, the Comptroller, who is black, and the President of the Board of Aldermen, who is white.

[3] To maintain consistency with Petitioner's citations, references to the appendix filed in this Court are denoted as ("App. ___."), and references to the appendix filed in the Eighth Circuit are denoted as ("__."). Respondents note, however, that pages 105-127 of the Eighth Circuit appendix, as well as portion H of the Supreme Court appendix, are supplemental materials the district court denied petitioners leave to file, and those materials are not properly a part of the record anywhere in this case.

percent deviation from the ideal ward population is 2.83% and the overall range or maximum deviation is 8.3%. (App. E-4.)

The Eighth Circuit Court of Appeals affirmed the grant of summary judgment, *African American Voting Rights Legal Defense Fund Inc. v. Villa*, 999 F.2d 1301 (8th Cir. 1993) (Table) (per curiam), and denied rehearing. (App. D.) Several plaintiffs withdrew from the case, but the current petitioners remained and sought a writ of certiorari. On the same date that this Court issued its opinion in *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994), this Court granted Petitioners' request for certiorari, vacated the appellate court's judgment, and remanded for further consideration in light of *DeGrandy*. *Tyus v. Bosley*, 114 S.Ct. 2776 (1994).

The Eighth Circuit Court of Appeals again affirmed, in a unanimous panel decision. *African American Voting Rights Legal Defense Fund Inc. v. Villa*, 54 F.3d 1345 (8th Cir. 1995). The Court of Appeals held the district judge did not abuse her discretion in denying plaintiffs leave to file additional belated materials in response to the defendants' summary judgment motion. (App. A-10-12.) The court further held the district court did not commit error in light of *Johnson v. DeGrandy* by using voting age population rather than total population to define the relevant population for assessing proportionality, or by including the entire City of St. Louis rather than only the central corridor area of the City to determine the number of majority-minority wards for measuring proportionality. (*Id.* at A-12-22.) The appellate court further concluded the district court did not treat the proportionality factor as a per se bar to a § 2 voting dilution claim and, in any event, proper consideration of the proportionality factor as it relates to the totality of the circumstances "leads inexorably to the conclusion that the complaints contained in the [plaintiffs'] affidavit fail to create a genuine issue of material fact as to whether a § 2 violation has occurred." (*Id.* at A-22-27.) Finally, the Court of Appeals rejected the

plaintiffs' argument that a § 2 "intent" claim requires no proof of a discriminatory effect. (*Id.* at A-27, n.18.) The Court of Appeals then denied Petitioners' request for a rehearing en banc. (App. B.) Petitioners again request that this Court grant certiorari.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because Petitioners, Who Are Not Residents Of The Wards Where They Claim That There Is Vote Dilution, Do Not Have Standing To Present That Claim.

Upon reconsideration in light of *Johnson v. DeGrandy*, the Eighth Circuit "assume[d] without deciding" that Petitioners had standing to assert their claims. (App. A-3 n.2.) The essence of Petitioners' claims is that blacks in the City of St. Louis have been denied an equal opportunity to elect representatives of their choice through dilution of their vote. (10-12.) At the time of the 1991 redistricting, Petitioner Freeman Bosley, Sr., had proposed a plan to the Board of Aldermen that would result in fourteen safe black wards out of a total of twenty-eight wards; the Board rejected Bosley's plan and instead adopted a plan which provided for twelve safe black wards. (App. A-6.) Petitioners have claimed there were three wards where "defendants maximized white voting power and minimized black voting power. . . 'in order to assure that black voters would not be able to elect representatives of their choice in said wards'": the 6th, 7th, and 17th wards. (88; Petition for Cert. at 5-6.)[4] Petitioners claim that without such vote dilution, blacks would have been able to constitute a voting age majority in wards 6 and 17, giving them

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[4] It is important to note here that this conclusory claim of intentional gerrymandering finds no support in the summary judgment record, and Petitioners acknowledged in their prior certiorari petition that this case never presented a *Shaw v. Reno* type of claim, (First Petition for Cert. at 24), which involves the limited, extreme case where a redistricting scheme is so bizarre that it can only be understood as an effort to segregate voters by race without justification. *See Shaw*, *supra*, 125 L.Ed. 2d at 536; *Miller v. Johnson*, 115 S.Ct. 2475, 2488 (1995).

fourteen safe black wards out of twenty-eight rather than only twelve. (*Id.*)[5]

The only persons who have standing to assert these claims are persons "who live in the district that is the primary focus of their. . . claim" or who can otherwise "demonstrate[] that they, personally, have been subjected to a racial classification." *See United States v. Hays*, 132 L.Ed. 2d 635, 639, 643 (1995). Petitioners are neither. Among Petitioners, Sharon Tyus is a resident and voter in the 20th ward; Freeman Bosley, Sr., in the 3rd ward; Bertha Mitchell in the 4th ward; Irving Clay, Jr. in the 26th ward; and Claude Taylor in the 27th ward. (3-4). According to Petitioners, and it has been undisputed, each one of the wards in which they reside is a safe black ward. (89). Thus, Petitioners lack standing, and it is not likely that the Court will reach any questions presented by their petition herein.[6]

II. The Petition Should Be Denied Because The Eighth Circuit Decision Is Wholly Consistent With *Johnson v. DeGrandy* And Other Precedent.

Throughout their petition, Petitioners color the Eighth Circuit's decision as holding that proportionality "defeats" their Voting Rights Act claims or is a "defense" to such claims. Simply put, the Eighth Circuit made no such holding. To the contrary, the Eighth Circuit reconsidered Petitioners' case at length in light of *DeGrandy*'s holding that "proportionality is not a 'safe harbor' that automatically defeats a claim of vote dilution" but "is only

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[5] Throughout the appellate process, Petitioners have continually reshaped their claims. In their prior certiorari petition, Petitioners argued that blacks lacked an opportunity to elect representatives of their choice in the 2nd, 6th, 7th, 8th, 17th and 25th wards, despite that their Complaint and evidence before the district court asserted the 2nd ward was a safe black ward. (First Petition for Cert. at 18-19.)

[6] This standing analysis remains pertinent even if Petitioners allegations are construed as directed primarily at the 2nd, 6th, 7th, 8th, 17th and 25th wards as set out at note 4 *supra*, as Petitioners reside in none of these wards.

one factor in the totality of circumstances." (App. at A-22.) The court methodically reviewed the Jones affidavit, which while largely conclusory was the only evidence plaintiffs put forth at the summary judgment stage. (*Id.* at A-25-26.) The court further noted that this case is virtually indistinguishable from *DeGrandy*, reviewed the evenhandedness with which the wards were drawn, and noted that the only alleged differential treatment was that black wards contained smaller populations than white wards, which if true actually enhances, not dilutes, black vote. (*Id.*)

Further, the Eighth Circuit's conclusion that a § 2 "intent" claim requires some showing of a discriminatory effect is consistent with this Court's precedent and other court of appeals decisions. This Court in *Voinovich.v.Quiller* stated "[o]nly if an apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect the candidate of its choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter." 113 S.Ct. 1149,1156 (1993). Federal courts of appeals consistently have reached the same conclusion. *See Barnett v. Daley*, 32 F.3d 1196, 1202 (7th Cir. 1994); *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). Indeed, § 2 of the Voting Rights Act by prohibiting discriminatory effects liberalizes the proof needed to establish a claim of voter discrimination under the Fourteenth Amendment—if a plaintiff could prove intent he would have a complete remedy under the equal protection clause and would not need § 2. *See Barnett*, 32 F.3d at 1202. Further, the language of § 2 itself speaks to a results claim. *See* 42 U.S.C. § 1973.

III. The Petition Should Be Denied Because The Claimed Split Among Lower Courts As To Whether To Use Voting Age Population Or Total Population In Assessing Proportionality Does Not Justify Granting A Writ Of Certiorari.

The cases Petitioners compare and contrast in order to draw a split over whether to use voting age population or total population when assessing proportionality under § 2 are: the Eighth Circuit case at bar and a post-*DeGrandy* Tennessee district court case which also used voting age population, versus a pre-*DeGrandy* Missouri district court case and a pre-*DeGrandy* Arkansas district court case (both in the Eighth Circuit) which used total population. (Petition for Cert. at 20.) The other case mentioned in this section of Petitioners' argument is *Barnett v. Daley*, 32 F.3d 1196 (7th Cir. 1994), in which the Seventh Circuit in dicta stated with respect to a § 2 claim that while "[t]he statutory language leans in favor of voting-age population," such language is not conclusive on the matter. *Id.* at 1202. The court in *Barnett* did not reach the issue of which population was more relevant. *Id.* These cases do not create a split in authority among the appellate courts justifying certiorari. *See* Supreme Court Rule 10.

Further, this Court in *DeGrandy* used voting age population as the relevant population when assessing proportionality, and *DeGrandy*, if it does not require the use of voting age population, at the very least permits the use of such population. *DeGrandy*, 114 S.Ct. at 2651, 2654, 2658 & n.11, 2662 n.18, 2663; *see* App. at A-16. As the Eighth Circuit in this case correctly recognized, *DeGrandy*'s refusal to hold that voting age population is the *only* relevant possible population does not detract from its holding that voting age population is *a* relevant population. (App. A-16.) Moreover, voting age population is a more relevant population to use when assessing proportionality under a § 2 claim because it more directly relates to the language of § 2 itself, which

prohibits processes resulting in the denial or abridgement of the right to vote on account of race or color, *see* 42 U.S.C. § 1973(a), a right possessed by *voters*.

IV. The Petition Should Be Denied Because The Facts Of This Case Do Not Give Rise To A Results Claim When Different Boundary Drawing Practices Were Used In The Black And White Communities.

As previously noted, Petitioners continue to reshape their claims on appeal. As the Eighth Circuit noted in its decision, the only allegations of differential treatment were that black wards had smaller populations. (App. A-26.) In pages 26-29 of their petition, Petitioners at length discuss "facts" that appear nowhere in this case. For example, it is unsupported that whites are not fractured among the wards, that all blacks in the "central corridor" could be part of black majority wards, that over 90% of the City's white and black residents live in respective contiguous boundaries, and that ward boundaries were manipulated to restore white voting-age majorities in wards that had become majority or plurality black. (Petition for Cert. at 26-29.) Petitioners' third argument amounts to a recharacterization of their claim that black voting power must be *maximized* or that blacks must be given proportional representation or proportionality based on their share of the total population—interpretations of the Voting Rights Act which, if accurate, render the Act unconstitutional and which are foreclosed by *DeGrandy*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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14pp

TABLE OF CONTENTS

	PAGE
I. THE LOWER COURT ERRED ON AN ISSUE OF MAJOR NATIONAL IMPORTANCE IN HOLDING, AS A MATTER OF LAW, THAT INTENTIONAL DISCRIMINATION IS NOT ACTIONABLE UNDER §2 OF THE VOTING RIGHTS ACT WHERE A REDISTRICTING PLAN ACHIEVES THE "BALANCED BOTTOM LINE" OF PROPORTIONALITY	1
II. THE LOWER COURT ERRED IN USING PROPORTIONALITY AS A "SAFE HARBOR" DEFENSE AGAINST PLAINTIFFS' §2 "EFFECTS" CLAIM	5
III. THIS COURT NEEDS TO RESOLVE THE CONFLICT IN THE LOWER COURTS REGARDING THE PROPER MEASURE OF PROPORTIONALITY, AND SHOULD MAKE CLEAR THAT TOTAL POPULATION, RATHER THAN VOTING-AGE POPULATION, IS THE RELEVANT BASELINE	8
IV. PETITIONERS HAVE STANDING UNDER §2 OF THE VOTING RIGHTS ACT TO CHALLENGE ST. LOUIS' 1991 WARD MAP	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	PAGE
Baird v. Consolidated City of Indianapolis, 976 F.2d 357 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2334, 124 L.Ed.2d 246 (1993) ..	3
Barnett v. Daley, 809 F.Supp. 1323 (N.D.Ill. 1992), *rev'd*, 32 F.3d 1196 (7th Cir. 1994)	7, 9
City of Richmond, Virginia v. U.S., 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975)	3
Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982)	2
DeWitt v. Wilson, 856 F.Supp. 1409 (E.D.Cal. 1994), *aff'd in part and appeal dismissed in part*, ___ U.S. ___, 115 S.Ct. 2637, 132 L.Ed.2d 876 (1995)	9
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Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991)	4, 5, 8
Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)	10
Johnson v. DeGrandy, ___ U.S. ___, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994)	2, 3, 5
Miller v. Johnson, ___ U.S. ___, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995)	3, 9
Shaw v. Reno, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)	3

United States v. Hays, ___ U.S. ___, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) 9

Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) 10

Statutes

United States Constitution, 15th Amendment 1

42 U.S.C. §1973 7

No. 95-852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SHARON TYUS; FREEMAN BOSLEY, SR.; BERTHA MITCHELL; IRVING CLAY, JR.; and CLAUDE TAYLOR,

Petitioners,

v.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and CITY OF ST. LOUIS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

I. THE LOWER COURT ERRED ON AN ISSUE OF MAJOR NATIONAL IMPORTANCE IN HOLDING, AS A MATTER OF LAW, THAT INTENTIONAL DISCRIMINATION IS NOT ACTIONABLE UNDER §2 OF THE VOTING RIGHTS ACT WHERE A REDISTRICTING PLAN ACHIEVES THE "BALANCED BOTTOM LINE" OF PROPORTIONALITY.

As plaintiffs argued in their opening brief, even if the Eighth Circuit's use of a "balanced bottom-line" approach was appropriate to dispose of plaintiffs' §2 "effects" claim against the 1991 St. Louis ward map, the use of proportionality to insulate the map from plaintiffs §2 "intent" claim directly contradicts holdings by both this Court and other circuits. In response, defendants repeat the Eighth Circuit's argument that to succeed, a §2 "intent" claim must show some form of vote dilution ("discriminatory effect"), and that intent plays little or no role in evaluating voting rights claims under §2.

Defendants' argument exhibits a fundamental misunderstanding of the text, logic and purpose of §2. To begin with, defendants are mistaken when they argue that the language of §2 solely "speaks to a results claim." (Respondents' brief 8; hereinafter "RB.") The language of §2(b), which was added by the 1982 amendment to the Voting Rights Act and does deal exclusively with "results" claims, *supplemented* rather than *supplanted* the original language of §2 (now §2(a)); that original language, which prohibits any type of discrimination on account of race and which has been interpreted to be coextensive with the demands of the Fifteenth Amendment, remains in full force and provides an alternative route to those plaintiffs who may have suffered intentional discrimination (*e.g.*, intimidation at the polling place or intentional gerrymandering) that is not subject to proof under §2(b) "results" claim analysis.

Moreover, both the Eighth Circuit and defendants appear to mistakenly believe that a failure to prove a §2 "effects"

claim necessarily means plaintiffs' cannot prove a claim of intentional racial gerrymandering. In fact, precisely because the nature of the proof required in an intent claim may differ from the nature of the proof required in an "effects" claim, a claim of intentional discrimination can be established even where an "effects" claim is foreclosed.

To see why this is true, it is useful to draw an analogy to discrimination cases in the employment context. Under Title VII, employees may sue under either a theory of disparate impact ("effect") or disparate treatment ("intent"). Proof that an employer maintains a racially-balanced workforce may be sufficient to defend against a Title VII disparate impact claim; to the extent that the plaintiff is relying solely on the aggregate numbers to make out his claim, the employer may rebut such evidence with his or her own set of numbers. On the other hand, "a racially-balanced workforce cannot immunize an employer from liability for specific acts of discrimination." *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 580 (1978); *see also Connecticut v. Teal*, 457 U.S. 440, 452-56 (1982) (rejecting "bottom-line" defense under Title VII). Even where a racially-balanced workforce exists, a group of employees may still assert that, under a disparate treatment theory, a supervisor has hurled racial epithets at them, or assigned them to the most difficult jobs, or made their promotions more difficult. To win on this claim, plaintiffs cannot simply rely on aggregate numbers; rather, they must gather particularized evidence of the alleged disparate treatment. But if plaintiffs do in fact gather and present such proof, the employer's defense must also be particularized; a showing that the employer maintains a racially-balanced workforce, without more, will not save that employer from a finding of liability under Title VII.

What is true in the employment context is true in the voting rights context. *See Johnson v. DeGrandy*, 114 S.Ct.

2647, 2660-61 (1994); *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 360 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2334 (1993). Like a racially-balanced workforce, the existence of sustained proportionality may be a sufficient defense to an "effects" claim, where plaintiffs' sole evidence that their voting strength has been diluted is a lack of such proportionality. In this case, however, plaintiffs have presented particularized and thus far undisputed evidence that (a) ward boundaries have been systematically drawn to maximize white voting strength and minimize black voting strength; and (b) these boundaries cannot be explained by any traditional, race-neutral redistricting criteria. In other words, at this stage of the litigation, plaintiffs have made out a strong case of intentional racial gerrymandering. Once sufficient allegations of discriminatory intent have been offered, the presence or absence of proportionality recedes in importance; rather than relying on a "safe harbor" defense of proportionality, defendants must now come back with equally particularized evidence that either directly disputes plaintiffs' facts or provides credible, race-neutral explanations for why ward boundaries were drawn as they were drawn.

It is this simple principle—that a balanced bottom-line does not excuse invidious, race-based decision-making by the state along the way—that underlies this Court's holding in *City of Richmond v. U.S.*, 422 U.S. 358, 378-79 (1975). It is also the underlying principle behind the analytically distinct equal protection claims recognized in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), and *Miller v. Johnson*, 115 S.Ct. 2475 (1995). These cases all establish that even where plaintiffs cannot show any "discriminatory effect" as the term is defined in garden-variety vote dilution claims, plaintiffs may still offer evidence—*e.g.*, memoranda or testimony indicating maximization of control for a particular racial group was an overriding factor in redistricting, or

"bizarrely-drawn" districts that cannot be explained by traditional redistricting principles—that residents of a jurisdiction were treated differently on account of race in violation of the Voting Rights Act.

Surprisingly, in making their argument that a §2 intent claim is not possible without a showing of vote dilution, respondents invoke the important Ninth Circuit holding concerning ethnicity-based redistricting in the County of Los Angeles. *See, Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). In fact, *Garza* endorses the exact legal principal we urge here: that intentional discrimination is unlawful under §2 even if a traditional §2 vote dilution claim cannot be established. In *Garza*, the County of Los Angeles could not prevail under §2 because they could not meet the *Gingles* preconditions; in particular, plaintiffs could not establish that they could have constituted a majority in any additional districts. *Id.*, at 771. Thus, plaintiffs could not establish a traditional vote dilution claim. Yet that was no barrier to plaintiffs' pursuit and successful proof of their claim that they had been intentionally discriminated against. As the *Garza* court stated in its opinion:

> To impose the requirement the County urges would prevent any redress for districting which was *deliberately designed* to prevent minorities from electing representatives in future elections governed by that districting. This appears to us to be a result wholly contrary to Congress' intent in enacting §2 of the Voting Rights Act and contrary to the equal protection principles embodied in the fourteenth amendment.

Id., at 771 (emphasis added).

Garza did, appropriately, require that plaintiffs establish some concrete injury resulting from this intentional discrimination:

> Although the showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases, some showing of injury must be made to assure that the district court can impose a meaningful remedy.

Id. The sufficient injury in *Garza* was the same as that alleged here: intentional discrimination diminished the voting power statutorily-protected voters would have had if the districting process had not been motivated by invidious intent.

II. THE LOWER COURT ERRED IN USING PROPORTIONALITY AS A "SAFE HARBOR" DEFENSE AGAINST PLAINTIFFS' §2 "EFFECTS" CLAIM.

As petitioners documented in our opening brief, the affidavit of plaintiffs' expert, Dr. Charlene Jones, amply testified that defendants manipulated ward boundaries unevenhandedly to (a) fracture blacks but not whites; (b) excessively pack blacks but not whites; (c) restore white voting-age majorities in wards that had become majority or plurality black and did not need to be redrawn, in contradiction of traditional redistricting standards, and without creating any comparable black-majority wards where whites were a majority or plurality of the population; (d) all with the intent and effect of minimizing black voting strength and maximizing white voting strength (50, 87-89). By entirely disregarding these facts at the summary judgment stage, the Eighth Circuit effectively circumvented this Court's holding in *DeGrandy* that even sustained proportionality is not a "safe harbor" in a §2 "effects" challenge, but may be overcome by a showing that a redistricting plan treats racial groups "inconsistent[ly]." *DeGrandy*, 114 S.Ct. at 2655, 2659.[1]

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[1] Rather than directly addressing plaintiffs' arguments that the Eighth Circuit erred as a matter of law in using proportionality

(continued...)

That neither the Eighth Circuit nor respondents perceive a "discriminatory effect" in this plethora of undisputed facts indicates the degree to which, as a matter of law, proportionality served as a "safe harbor" and precluded any inquiry into actual vote dilution. The Eighth Circuit's legal error results from the insistence on equating proportionality with the absence of vote dilution. As plaintiff explained at length in briefing before the Eighth Circuit, proportionality may in fact be the best measure of discriminatory effect in many traditional §2 vote dilution cases, particularly those cases challenging at-large, multi-member districts in juris-

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[1] (...continued)

as a "safe harbor" defense in dismissing both plaintiffs' §2 "intent" and "effects" claims, respondents accuse petitioners of presenting evidence of differential treatment that is "unsupported" in the record (RB 10). Defendants' attempt to cast doubt on plaintiffs' presentation of the facts is misguided: every fact asserted in plaintiffs' petition, including the official city ward map attached as Exhibit H, is part of the Eighth Circuit record and is thus far uncontested.

This is certainly true of the three specific facts that respondents claim are "unsupported" by the record. First, plaintiffs' evidence shows that the six central-corridor wards systematically fracture black population; and there is ample geographically-compact black population in the central corridor for *at least* two black wards (88-89). The acknowledgement of this fact is not an argument "that black voting power must be maximized" (RB 10). The Eighth Circuit itself recognized that "[b]ecause of the combined effects of geography and segregation, the aldermanic wards may be drawn to create . . . seventeen safe black wards" (A6), or at least *four* more effective black-majority wards in the central-corridor area. Defendants have never pointed to any white population that could have been part of a white-majority ward but was instead "fractured" into an effective black ward.

Second, plaintiffs' statement in their opening brief that 90% of the city's white and black residents live within contiguous boundaries comes from the Eighth Circuit's opinion (A5). Finally, the fact that "ward boundaries were manipulated to restore white voting-age majorities in wards that had become majority or plurality black" comes directly from Dr. Jones's affidavit (87).

dictions containing only two significant racial groups. The implicit assumption in such cases is that, where the *Gingles* preconditions have been shown to exist, an evenhanded process of redistricting would produce a roughly-proportionate number of minority-controlled districts.

In other contexts, however, proportionality will not accurately measure discriminatory effect. This case presents an example of a situation where proportionality will not necessarily measure discriminatory effect—that is, where the minority population is younger than the white population, racial bloc voting is prevalent, and housing patterns are such that a handful of wards subject to redistricting can be drawn to contain either black or white majorities.[2] In such a situation, map drawers may "pack" and "fracture" black populations along adjoining black and white communities so as to maximize the number of white-majority wards and minimize the number of black-majority or plurality wards. The resulting discriminatory effect is both obvious and significant: black voting power is diminished below what would result from a fair, evenhanded, and non-invidious political process. *See* 42 U.S.C. §1973(b).

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[2] A second example can be found in those jurisdictions that contain not only blacks and whites, but also Latinos or Asians who are scattered among both black-majority and white-majority communities, and therefore are not sufficiently geographically-compact to control their own single-member district. In such a situation, a white-controlled legislature may gerrymander districts to ensure that the scattered Latino or Asian communities "stretch" the number of white-dominated wards and enhance the election chances of white incumbents, even while providing blacks with rough proportional representation. *See, e.g., Barnett v. Daley*, 809 F.Supp. 1323, 1329 (N.D.Ill. 1992), *rev'd*, 32 F.3d 1196 (7th Cir. 1994).

III. THIS COURT NEEDS TO RESOLVE THE CONFLICT IN THE LOWER COURTS REGARDING THE PROPER MEASURE OF PROPORTIONALITY, AND SHOULD MAKE CLEAR THAT TOTAL POPULATION, RATHER THAN VOTING-AGE POPULATION, IS THE RELEVANT BASELINE.

Respondents assert the lower courts are not in direct conflict over whether the proper baseline for determining proportionality in a §2 case is total population or voting-age population—or even other possible baselines, such as citizen voting-age population. But this important question, which will necessarily recur in every case in which the defense of proportionality is raised, is one on which the lower courts are, in fact, squarely divided.

In this case, the Eighth Circuit directly rejected petitioners' position that total population provides the appropriate legal standard; instead, the Eighth Circuit held that voting-age population provides the correct legal standard (A16-18). In direct contrast, the Ninth Circuit has held precisely the opposite in a case respondents inexplicably ignore:

> Adherence to a population standard, rather than one based on registered voters, is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government.

Garza, 918 F.2d at 775. As the Ninth Circuit reasoned in *Garza*, another case involving redistricting of a major urban area:

> Basing districts on voters rather than total population results in serious population inequalities across districts. Residents of the more populous districts thus have less access to their elected representative.

Id., at 774.

Similarly, the three-judge court that recently reviewed the redistricting of the California legislature also explicitly rejected the argument that voting-age population, rather

than total population, should provide the basis for judging the fairness of redistricting under the Voting Rights Act. *DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D.Cal. 1994), *aff'd in part and appeal dismissed in part*, 115 S.Ct. 2637 (1995). In direct contrast to the Eighth Circuit, the three-judge court concluded:

> There is no merit to this contention [that voting-age population should provide the baseline]; population, not voter registration, is the appropriate basis for apportioning districts.

Id., at 1414 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). *See also Barnett v. Daley*, 32 F.3d 1196, 1200 (7th Cir. 1994).

IV. PETITIONERS HAVE STANDING UNDER §2 OF THE VOTING RIGHTS ACT TO CHALLENGE ST. LOUIS' 1991 WARD MAP.

Respondents also argue that petitioners, all of whom are black registered voters and residents of St. Louis, lack standing to bring this vote dilution claim. Respondents base this argument exclusively on this Court's opinion in *United States v. Hays*, 115 S.Ct. 2431 (1995).

Nothing in *Hays* supports defendants' novel contention that residents of "packed" districts lack standing to bring a vote dilution challenge. *Hays* did not involve vote dilution claims brought under the Voting Rights Act, but instead involved claims brought under the equal protection analysis set forth in *Shaw* and *Miller*. As this Court has repeatedly emphasized, such *Shaw/Miller* claims are "analytically distinct" from vote dilution claims; *see Miller*, 115 S.Ct. at 2485, they do not depend on a showing that a plaintiff's vote has been diluted.

More specifically, vote dilution claims and *Shaw/Miller* claims rest on different categories of injury. As such, they require different showings to establish standing. Because

the injuries resulting from a *Shaw/Miller* violation may be "difficult to discern," a court cannot infer that a plaintiff living outside the district that is subject to the racial gerrymander is asserting a personalized harm, rather than a "generalized grievance against government conduct of which he or she does not approve." *Hays*, 115 S.Ct. at 2436. In contrast, the injuries to plaintiffs in a vote dilution case are by their very nature direct and palpable; black voters who have been "packed" or "fractured" are not only stigmatized on the basis of race, but suffer from the wasting of their votes and the deprivation of influence in other wards. *See, Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979); *Warth v. Seldin*, 422 U.S. 490, 499 (1975). These are the injuries that petitioners in this case assert, and under long-standing principles involving vote dilution litigation under the Voting Rights Act, black residents and voters throughout the jurisdiction have standing to challenge a redistricting plan that dilutes the votes of blacks as a group.

CONCLUSION

For all the reasons stated above, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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